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No. 95-961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ED K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the federal courts, when reviewing a state prisoner's capital sentence imposed in a weighing state, must conduct harmless error analysis in an instance where the sentencer considered a constitutionally invalid aggravating circumstance, despite the fact that the state's highest court did not conduct an independent harmless error analysis prior to federal habeas review.

II. Whether, in the event Question One above is answered in the affirmative, the federal habeas courts must apply the harmless error standard specified in *Chapman v. California*, 386 U.S. 18 (1967), the standard specified in *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993), or some other standard.

III. Whether, in the event Questions One or Two or both are considered, the federal habeas courts must defer to a factual finding by the state's highest reviewing court that no mitigating circumstances exist.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW Ed K. McDaniel, Warden of the Ely State Prison, and Frankie Sue Del Papa, the Attorney General of Nevada, and file this petition for writ of certiorari seeking a reversal of a portion of the Opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 15, 1995, and is reproduced in Appendix A. *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995). The federal district court's unpublished decision and accompanying judgment which immediately preceded the circuit court litigation are reproduced in Appendices B and C, respectively.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus petition on November 6, 1990. *See* 28 U.S.C. §§ 1331, 2241, 2254. Petitioners [hereinafter referred to as the State] filed an appeal following the district court's grant of sentencing relief to respondent [hereinafter referred to as McKENNA]. *See id.*, §§ 1291, 2253. McKENNA filed a cross appeal as to the district court's denial of guilt phase relief. The circuit court issued a certificate of probable cause to appeal. The judgment of the Court of Appeals for the Ninth Circuit was filed on September 15, 1995. This petition for writ of certiorari is filed within ninety days of the judgment of the court of appeals below. Supreme Court Rule 13. The

jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII, states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d) (1995) is reproduced in its entirety in Appendix N, pursuant to Supreme Court Rule 14(1)(f).

Nev. R. App. P. 5 is reproduced in its entirety in Appendix O, pursuant to Supreme Court Rule 14(1)(f).

Nev. Rev. Stat. § 200.030 states in pertinent part:

> 4. Every person convicted of murder of the first degree shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.
>
> (b) Otherwise, by imprisonment in the state prison for life with or without possibility of parole. If the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

Nev. Rev. Stat. § 200.033 states in pertinent part:

> The only circumstances by which murder of the first degree may be aggravated are:
>
> . . .
>
> 2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another
>
> . . .
>
> 8. The murder involved torture, depravity of mind or the mutilation of the victim.

STATEMENT OF THE CASE

The State of Nevada has lawful custody of Patrick Charles McKenna pursuant to a judgment of conviction for first degree murder following a jury trial which lasted from August 16, 1982 to September 2, 1982, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark [hereinafter referred to as the trial court or the Clark County District Court].[1] McKENNA was sentenced to death

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[1] This was the second trial of the case following McKENNA's conviction by a Douglas County, Nevada jury, which heard the case after change of venue from Clark County. Subsequently, McKENNA'S conviction and death sentence were reversed by the Nevada Supreme Court. *McKenna v. State*, 639 P.2d 557 (Nev. 1982). Venue was returned to Clark County for the retrial, the result of which is at issue in this case. McKENNA is also subject to the State's custody for felony convictions in Clark County unrelated to the instant case. *McKenna v. State*, 647 P.2d 865 (Nev. 1982) (convictions for attempted escape with the use of a dangerous weapon, ex-felon in possession of a firearm, and robbery). *McKenna v. State*, 618 P.2d 348 (Nev. 1980)(convictions for sexual assault, second-degree kidnapping with the use of a deadly weapon, and robbery).

by the jury following a penalty phase hearing for the January 6, 1979 murder of a fellow Clark County jail inmate, Jack Nobles. The jury found two aggravating circumstances -- murder by a person previously convicted of a felony involving the use or threat of violence to the person of another, and murder involving depravity of mind.[2] The jury also returned blank and unsigned a verdict form allowing for a finding that mitigating circumstances did not outweigh the aggravating circumstances. (Special verdicts reprinted as Appendices L and M, respectively).

McKENNA appealed to the Nevada Supreme Court, which affirmed both the conviction and sentence. *McKenna v. State*, 705 P.2d 614 (Nev. 1985), *cert. denied*, *McKenna v. Nevada*, 474 U.S. 1093 (1986) (reprinted in Appendix D). McKENNA then sought but was denied post-conviction relief after remand for an evidentiary hearing conducted by the successor to the original trial judge. *McKenna v. State*, Case No. 18074, Order and Order Of Remand, (Nev., filed Sept. 23, 1987 and Oct. 29, 1987, respectively) (reprinted in

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[2] *See* Nev. Rev. Stat. § 200.033(2) and (8) (1993). In 1995, the Nevada legislature deleted the depravity of mind aggravator while leaving the torture and mutilation portions of subsection (8) in place. 1995 Nev. Stat. 2705.

Appendices E and F, respectively). *State v. McKenna*, Case No. C44366, Order Denying Post-Conviction Relief (Clark County District Court, filed Feb. 17, 1988) (reprinted in Appendix G). McKENNA'S appeal to the Nevada Supreme Court was denied. *McKenna v. State*, Case No. 19026, Order Dismissing Appeal (Nev., filed Jan. 18, 1990), *cert. denied*, *McKenna v. Nevada*, 498 U.S. 925 (1990) (reprinted in Appendix H).

McKENNA then filed his federal petition for writ of habeas corpus. United States District Judge Philip M. Pro denied relief as to the conviction but vacated the death sentence, based on the conclusion that the jury weighed an unconstitutional aggravating circumstance in the sentencing calculus when it considered the depravity of mind provision. *McKenna v. Godinez, et al.*, CV-S-90-785-PMP (LRL), Memorandum Decision and Order, and Judgment in a Civil Case, (D.Nev., filed Feb. 20, 1990) (reprinted in Appendices I and J, respectively). Following a remand order by the Ninth Circuit, Judge Pro once again denied relief as to the conviction but granted sentencing relief. *McKenna v. Godinez, et al.*, CV-S-90-785-PMP(LRL), Memorandum Decision and Order, and Judgment in a Civil Case, (D.Nev., filed Dec. 14, 1992) (reprinted in Appendices B and C, respectively). The parties

then cross-appealed, with the Ninth Circuit granting McKENNA a certificate of probable cause.

The three judge panel of the circuit court affirmed the federal district court's decision in all pertinent respects. *McKenna v. McDaniel*, 65 F.3d 1983 (9th Cir. 1995) (reprinted in Appendix A). The circuit court stayed issuance of the mandate. *McKenna v. McDaniel, et al.*, Case Nos. 93-99001 and 93-99002, Order (9th Cir., filed Oct. 10, 1995) (reprinted in Appendix K). The State now seeks relief from that portion of the circuit court's order which affirmed Judge Pro's grant of relief as to McKENNA'S death sentence.

SUMMARY OF THE ARGUMENT

The Ninth Circuit upheld the district court's decision to overturn McKENNA'S death sentence. The decision of both courts was based upon the finding of an invalid aggravating circumstance. After upholding the reversal of sentence by the district court, the Ninth Circuit refused to conduct a harmless error review pursuant to the harmless error standard announced in *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993). The Ninth Circuit has decided an important question of law in a way which conflicts with decisions of other federal

circuit courts by not conducting a harmless error review pursuant to the harmless error standard announced in *Brecht*.

If this court does not grant the writ and provide guidance to the lower courts, those states seeking to enforce the death penalty will be required to needlessly delay adjudication of the harmless error question which ultimately will be decided *de novo* in the federal courts even if the question is fully litigated in the state courts first.

The circuit court refused to certify the harmless error question to the Nevada Supreme Court for decision, notwithstanding respondent's concession that certification should occur. Nevada's highest court, whose factual findings were improperly rejected by the circuit court, will effectively be prohibited from conducting either a rebalancing of aggravating and mitigating circumstances or harmless error review as is contemplated by this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and as is authorized on direct appeal by state law. *Canape v. State*, 859 P.2d 1023 (1993), *cert. denied*, 113 S.Ct. 176, (1994).

The Ninth Circuit's erroneous legal conclusion was based, at least in part, on its own factfinding venture regarding the existence of mitigating circumstances. The circuit court's finding is contrary to a finding by the Nevada Supreme Court

that none existed. The Ninth Circuit clearly violated 28 U.S.C. § 2254(d) and the policy of comity it embodies. This Court should intervene to correct this egregious error.

REASONS FOR GRANTING THE WRIT

There exists a distinct split of authority among several federal circuit courts of appeal regarding the question of whether a federal habeas court, without the benefit of a state court harmless error review, initially should conduct a harmless error review where the federal courts have decided that an improper aggravating circumstance was weighed in the capital sentencing calculus. Two circuits have directly addressed the issue and have concluded that the federal courts either can or must do so. One has concluded expressly that this cannot be done prior to a state's highest court reevaluating a case following a federal court's assessment in the first instance that an aggravating circumstance is infirm. In this case the Ninth Circuit refused to conduct a harmless error analysis, and thus is at odds with sister circuit courts and, arguably, its own precedents as well. This is the type of case that warrants review under Supreme Court Rule 10(a).

Moreover, in those circuits which have concluded that some form of harmless error review is either permissible or

mandatory, there exists a split of authority as to which of the alternative, well established standards announced in *Brecht* and *Chapman*, 386 U.S. 18 (1967), apply. Here, the Ninth Circuit applied *Brecht* in the guilt phase context but rejected the State's contention that the federal courts likewise must expressly address the question in the penalty phase context. This case presents an excellent opportunity to resolve the second question as well, pursuant to Supreme Court Rule 10(a).

This case also presents the opportunity to resolve critical, unanswered questions of federal law which warrant resolution, pursuant to Supreme Court Rule 10(c). Although this Court recently addressed a similar but not identical situation in *Tuggle v. Netherland*, 116 S.Ct. 283 (1995), it did not finally resolve the issues presented in this case. This Court's disposition in *Tuggle*, to wit, a remand to the Fourth Circuit for a possible harmless error review where error occurred in non-weighing state, substantially begs the questions raised in this case. At least one justice of this Court would appear to agree with the State's position in this case that a harmless error review should be done in the circuit courts utilizing the *Brecht* standard. *See, Tuggle*, at 286, (Scalia, J., concurring).

Finally, this case also presents an adequate context in which this Court may reject an unsupported, obliquely stated legal proposition relied upon by the Ninth Circuit to overturn McKENNA'S death sentence -- that there was a finding of a mitigating circumstance or circumstances by one or more of the trial jurors. This Court can reaffirm the vitality of the meaning of 28 U.S.C. § 2254(d) (Appendix N) by sustaining the finding by Nevada's highest court that there were no mitigating circumstances. By so doing, this Court would clarify what should have been but was not obvious to the circuit court--that the mere proffer of what a defendant contends is mitigating evidence is not necessarily synonymous with a finding by one or more jurors that the evidence rises to the level of a mitigating circumstance.

In short, inasmuch as the jurors had the opportunity to specify their findings as to mitigation but returned a special verdict form blank (Appendix M), and given its own independent evaluation of the proffered mitigation evidence, the Nevada Supreme Court fairly could find that there were no mitigating circumstances. Thus, even if reweighing were possible, there are no mitigating circumstances for the Nevada Supreme Court to "reweigh" against the remaining valid

aggravator, nor are there any for the federal courts to consider during a mandatory harmless error analysis under *Brecht*.

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW IN A WAY WHICH CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS BY NOT CONDUCTING A HARMLESS ERROR REVIEW PURSUANT TO THE HARMLESS ERROR STANDARD ANNOUNCED IN *BRECHT V. ABRAHAMSON*, 113 S.CT. 1710 (1993).

This Court has held that in a weighing state, the state's highest court can cure the type of sentencing defect found by the Ninth Circuit to exist here, that is, consideration of an unconstitutional aggravating circumstance. This can be done through a harmless error analysis or, if state law permits, through a state appellate court reweighing of valid aggravators against established mitigators. *Clemons v. Mississippi*, 494 U.S. 738 (1990). This must be done to ensure an individualized sentencing determination. *Stringer v. Black*, 112 S.Ct. 1130, 1136 (1992). When necessary, where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state's highest court must "actually perform a new sentencing calculus" in order for the sentence to stand. *Richmond v. Lewis*, 113 S.Ct. 528, 535 (1992).

The Nevada Supreme Court takes seriously its duty to abide by this Court's requirement to avoid a death sentence which is violative of the Eighth Amendment.[3] The Nevada Supreme Court has concluded that Nevada is a weighing state. *Canape*, 859 P.2d 1023, 1033 (1993), *cert. denied*, 113 S.Ct. 176 (1994). When performing appellate review pursuant to *Clemons*, the Nevada Supreme Court has treated cases differently depending on the findings of the sentencing body and the existence or non-existence of a proper jury instruction. In the Nevada case the State views as most analogous to McKENNA'S, the court concluded that the depravity of mind aggravator was infirm, yet it proceeded to conclude (1) that the remaining aggravators necessarily could not be outweighed by non-existent mitigating circumstances; and (2) that consideration of the depravity aggravator was harmless error. *Canape*, 859 P.2d at 1035. *See also Beets v. State*, 821 P.2d

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[3] Decisions of the Nevada Supreme Court subsequent to MCKENNA'S last state court appeal make it evident that Nevada's depravity of mind aggravating circumstance, which was not the subject of a proper definitional instruction at MCKENNA'S trial nor the subject of appellate narrowing, cannot withstand scrutiny in this case. *Robins v. State*, 798 P.2d 558, 570 (Nev. 1990), *cert. denied*, 499 U.S. 970 (1991) (holding that Nev. Rev. Stat. 200.033(8) is to be read in the conjunctive, thus requiring either torture, mutilation or other serious and depraved physical abuse beyond the act of killing to sustain a finding of depravity). *See also, Smith v. State*, 881 P.2d 649, 655 (Nev. 1994). At this juncture, the State does not contend that the Ninth Circuit erred in finding the aggravator invalid.

1044 (Nev. 1991), *cert. denied*, 113 S.Ct. 116 (1992) (affirming death penalty after eliminating depravity of mind aggravator, since there were no mitigating circumstances even though defendant proffered evidence of mitigation).

In a closer case, the Nevada Supreme Court concluded that appellate level reweighing after elimination of the depravity aggravator was appropriate, and that the death penalty should be affirmed. *Libby v. State*, 859 P.2d 1050 (Nev. 1993). Finally, in certain "too close to call" cases, the Nevada Supreme Court has concluded that consideration of the undefined depravity factor was not harmless error and that remand for a new sentencing hearing was the most appropriate course of action. *Pertgen v. State*, 875 P.2d 361, 367 (Nev. 1994); *Smith v. State*, 881 P.2d 649, 656 (1994) (where ill-defined depravity aggravator was arguably the only one remaining, a new sentencing hearing was appropriate).

In the circuit court, the State contended and McKENNA essentially conceded, that the Ninth Circuit should certify pursuant to Nev. R. App. P. 5 the alternative questions of how the Nevada Supreme Court would treat the reweighing

calculus and harmless error issue in McKENNA'S case.[4] Nevertheless, the circuit court rejected the parties' suggestion and, without expressly so stating, also rejected the State's alternative contention that the circuit court could and should perform a harmless error analysis.

This Court is faced with a range of differing holdings from circuit courts outside the Ninth Circuit as to (1) whether the federal courts can, should or must conduct a harmless error analysis; and (2) if one is conducted, what the correct standard should be. The Fourth Circuit's controlling authority mirrors the State's position in this case. In *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994), the en banc Fourth Circuit was faced with deciding whether consideration of North Carolina's heinous, atrocious and cruel (HAC) aggravating circumstance without an adequate jury instruction constituted reversible error. Interestingly, the same decision sequence had occurred in that case, where the HAC factor had been invalidated during federal habeas review well after the North Carolina Supreme Court had lost jurisdiction to conduct a *Clemons* review. The

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[4] The State noted that arguably, other than the certification procedure, there was no mechanism for the Nevada Supreme Court to perform a *Clemons* analysis after direct appeal, once it possesses only appellate jurisdiction to review a final order of a district court. Nev. Const. art. VI § 4.

Fourth Circuit held that *Clemons* could not be read to limit the harmless error review process to the state high courts, and that the federal courts were both qualified and required to conduct harmless error review.

The *Smith* court expressly repudiated a different holding by a sister circuit, announced in *Wiley v. Puckett*, 969 F.2d 86, 94 n.8 (5th Cir. 1992). In *Wiley*, the circuit court considered the same issue in the context of finding an invalid aggravator under Mississippi's weighing scheme. Without much explanation, the Fifth Circuit opined that *Clemons* must be read to allow only state high courts, not federal courts, to conduct a harmless error review.[5] If nothing else, *Smith*, *Wiley* and the Ninth Circuit's decision in *McKenna* demonstrate that the ultimate effect of the federal courts' refusal to conduct harmless error review is to compound the vagaries of state law jurisdictional limitations--some states'

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[5] Notably, the Fifth circuit pointed out an avenue of review available to the State of Mississippi which is not available to Nevada, that is, via the filing of a motion by the state asking the Mississippi Supreme Court to take jurisdiction of cases rather than having them returned to the trial courts. *Accord, Wilcher v. Hargett*, 978 F.2d 872, 879 (5th Cir. 1992) (case remanded for issuance of writ unless Mississippi initiates *Clemons* review proceedings in state court within a reasonable time). Compare, *Lozada v. State*, 871 P.2d 944 (Nev. 1994) (following issuance of federal writ of habeas corpus Nevada Supreme Court may not reinstitute appellate proceedings absent a final order of a state district court).

high courts will be able to conduct a *Clemons* review after a federal court sentence reversal while others will not. Surely, this is not a desirable result for those states like Nevada, especially where the federal habeas courts might otherwise conclude that the sentencing result was free from prejudicial error.[6]

Moreover, the circuit courts are split as to whether the *Chapman v. California* standard ("whether the state has shown beyond a reasonable doubt that error complained of did not contribute to the verdict") governs or whether the *Brecht v. Abrahamson* standard ("whether the error had substantial and injurious effect or influence in determining the jury's verdict") applies, even though the state courts may never have applied *Chapman*.

On the one hand, the Fourth Circuit in *Smith*, 14 F.3d at 980, adopted *Brecht* even though it concluded it would have

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[6] Prior to *Brecht*, at least one circuit concluded without expressly stating it had conducted an independent harmless error inquiry, that it was satisfied the Florida Supreme Court had adequately performed its *Clemons* harmless error analysis on direct appeal. *White v. Singletary*, 972 F.2d 1218, 1227 (11th Cir. 1992) (upholding death sentence death sentence where there were two remaining aggravators and no mitigation). This arguably constitutes a separate methodology and counsels in favor of adopting a unitary review standard applicable to all cases whether or not they have been first reviewed in the state courts. *But see, Marek v. Singletary*, 62 F.3d 1295, 1303 (11th Cir. 1995) (denying writ using *Brecht* standard where there were no mitigating circumstances and three aggravating circumstances).

affirmed the death penalty if *Chapman* were applicable. *Accord, Marek v. Singletary*, 62 F.3d 1295, 1303 (11th Cir. 1995). However, in a slightly different legal context, the Eighth Circuit concluded that since the *Brecht* rule was premised on the notion of a state court review under *Chapman* lessening the need for an equally exacting review in the federal courts, where the former is not performed the federal courts must apply *Chapman*. *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993) (death penalty vacated where differences in pre-hypnotic and post-hypnotic testimony of key witness not harmless beyond a reasonable doubt).

The uncertainty of whether and how to approach the issues are obvious, and should be resolved in this case.

II. IF THIS COURT DOES NOT GRANT THE WRIT AND PROVIDE GUIDANCE TO THE LOWER COURTS, THOSE STATES SEEKING TO ENFORCE THE DEATH PENALTY WILL BE REQUIRED TO NEEDLESSLY DELAY ADJUDICATION OF THE HARMLESS ERROR QUESTION WHICH ULTIMATELY WILL BE DECIDED *DE NOVO* IN THE FEDERAL COURTS EVEN IF THE QUESTION IS FULLY LITIGATED IN THE STATE COURTS FIRST.

If the cases outlined above were not sufficient to show how the issue has received disparate treatment among the circuits, a brief review of evolving Ninth Circuit case law should cause this Court to grant review to eliminate disparate

treatment of cases considered within that circuit alone. Doing so would help minimize delay of the kind Nevada faces in this case, if it has to conduct a new penalty phase hearing more than seventeen (17) years after the murder.

Prior to McKENNA'S case, the Ninth Circuit had decided at least four other cases in which harmless error generally or the application of *Clemons* specifically were at issue. In *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993), a Washington state capital case, the Ninth Circuit panel acknowledged the recently announced principle that the *Brecht* harmless error standard applies during federal collateral review.

Following *Jeffries*, a totally divided three judge panel visited the issue in *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994), a California death penalty case in which the circuit court invalidated the torture--murder special circumstance because the jury was not informed by an instruction that the jury had to find the defendant specifically intended to torture the victim. The court did not indicate how or if the California Supreme Court conducted a *Clemons* analysis.[7] In the lead

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[7] It appears that no *Clemons* review occurred in the state supreme court since Wade's direct appeal was decided before *Clemons*, and the circuit court declined to review Wade's apparent claim that the state courts did

opinion joined in part by one other circuit court judge, Judge Canby wrote:

> If a factor used to determine whether a defendant is eligible for the death penalty fails to narrow adequately the class of capital crimes, a reviewing court may affirm the death sentence only by finding that consideration of the improper aggravating factor was harmless or by reweighing the evidence without considering the factor. *Sochor v. Florida*, 112 S.Ct. 2114, 2122-23 (1992). The error in this case was not harmless, because it necessarily had a "substantial and injurious effect or influence in determining the jury's verdict" in imposing a sentence of death. *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1722 (1993). In determining whether an error is harmless, "the question is *not* 'were they [the jurors] right in their judgment, regardless of the error or its effect on the verdict. It is rather what effect the error had or reasonable may be taken to have had upon the jury's decision.'" *Brecht*, 113 S.Ct. at 1724 (Stevens, J., concurring) (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946)); *see also Sullivan v. Louisiana*, 113 S.Ct. 2078, 2081 (1993) ("The inquiry...is not whether, in a trial that occurred without the error, a guilty

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not follow the dictates of Clemons. *Wade*, 29 F.2d at 1315, n.1.

> verdict would have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"). Here, the effect of the error was to permit the jury to find Wade eligible for the death penalty without having to make any finding of his intent to torture. The error thus influenced the jury's verdict. [Footnotes omitted].

Thus, prior to *McKenna*, 65 F.3d 1483 (9th Cir. 1995), at least one panel had apparently concluded that as a "reviewing court" the Ninth Circuit had the authority to perform a review using *Brecht* as its benchmark.

Following *Wade*, in *Jeffers v. Lewis*, 38 F.3d 411 (9th Cir. 1994), an Arizona state capital case, the en banc court recognized the narrower, yet still general principle announced in *Clemons*, that state courts in weighing states can either conduct harmless error review or reweigh. Since the Arizona courts had reweighed, harmless error analysis was not at issue.

Then, just prior to *McKenna*, yet another Ninth Circuit panel held that *Brecht* stated the proper standard for review for error in sentencing instructions in weighing states, but concluded that California was not a weighing state when the prisoner was sentenced. *Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995).

Despite this developing precedent, the *McKenna* panel found error and then chose not to perform a harmless error review at all, opting instead to return the case to the Nevada courts where such a review is foreclosed by state law--thus virtually ensuring a new penalty hearing and the concomitant delay which accompanies it.

Surely, it serves little purpose to limit harmless error review to instances where *Chapman* type harmless error review is first conducted in state courts, when inevitably, the federal courts will assess the same errors years later in a non-deferential *de novo* fashion, albeit under the more circumscribed *Brecht* standard. Moreover, a disposition like the one in this case serves no purpose at all when the federal habeas courts are informed that the state courts are foreclosed from reassessing capital sentencing errors under *Clemons* because they lack jurisdiction to accept a sideways "remand" once the federal courts find error that was not found or reviewed initially by the state courts.

The result in McKENNA'S case is particularly absurd, in light of the *Wade* and *Williams* holdings just prior to the panel's decision. This case beckons this Court's review in order to (1) resolve the intracircuit disparity along with the aforementioned intercircuit conflict; and (2) to further limit,

perhaps by years, the delay occasioned by orders which effectively require new penalty hearings for what may well be legally inconsequential errors.

III. IF THIS COURT DOES NOT GRANT CERTIORARI, NEVADA'S HIGHEST COURT, WHOSE FACTUAL FINDINGS WERE IMPROPERLY REJECTED BY THE CIRCUIT COURT, WILL EFFECTIVELY BE PROHIBITED FROM CONDUCTING EITHER A REBALANCING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES OR HARMLESS ERROR REVIEW AS IS CONTEMPLATED BY THIS COURT'S DECISION IN *CLEMONS V. MISSISSIPPI*, 494 U.S. 738 (1990).

Simply stated, the Ninth Circuit disregarded its own precedents and those of this Court. It compounded its error by failing to defer to the Nevada Supreme Court's finding that there were no mitigating circumstances. As noted above, the jury had ample opportunity to return specific findings of mitigating circumstances but it did not do so. Understandably, and given its own independent review of the record as well, Nevada's highest court properly concluded that the jury had found none to exist. *McKenna*, 705 P.2d at 622.

The circuit court decided the facts differently, probably because (1) it confused the concept of mitigating evidence merely proffered with mitigating circumstances actually found; and (2) it chose not to draw the same inferences from the blank special verdict form that the Nevada Supreme Court did.

Neither is a sufficient reason to engage in impermissible factfinding.

First, the panel violated the dictates of 28 U.S.C. § 2254(d) (Appendix N) by encroaching on the state courts' purview to decide questions of historical fact, or what this Court recently described as "what happened" questions. *Thompson v. Keohane*, 1995 WL 698869 (U.S. 1995). Second, the panel failed to recognize this Court's precedents as well as Ninth Circuit precedent which dictated deference to state court findings of fact, even when issued by appellate courts. *Neuschafer v. McKay*, 807 F.2d 839, 841 (9th Cir. 1987), *citing Wainwright v. Goode*, 464 U.S. 78, 85 (1983); and *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981).

Third, merely because it would have been helpful for review purposes if the jury had rendered an express finding such as "WE FIND NO MITIGATING CIRCUMSTANCES," this does not mean that the federal courts may disregard logical inferences drawn by the state courts. Indeed, the circuit court should have been informed by its own recent decisions directly on point. *Jeffries*, 5 F.3d at 1197, *citing Parker v. Dugger*, 498 U.S. 308, 314-319 (1991) (in the absence of a statutory requirement to do so, jury not required to specify or exhaustively document its analysis of each mitigating factor,

so long as federal court can discern from the record that state court considered mitigating evidence offered by defendant) (emphasis added); and *Jeffers*, 38 F.3d at 418, *citing inter alia, Parker*, *Clemons*, and *Gardner v. Florida*, 430 U.S. 349, 361 (1977) (specific listing and discussion of mitigating evidence not constitutionally required as long as record shows sentencer considered it).

It is the State's position that even if the federal courts were to assume arguendo, that everything McKENNA offered as mitigating evidence was considered to be a mitigating circumstance technically subject to weighing against the remaining aggravator under Nev. Rev. Stat. § 200.030, the application of either *Chapman* or *Brecht* would yield the same result--a well deserved capital sentence. If however, this Court corrects the Ninth Circuit's two critical mistakes--(1) its miscalculation that mitigating evidence equates to mitigating circumstances; and (2) its usurpation of fact finding duties, the outcome is a foregone conclusion. Because there would be nothing significant to consider in conducting a harmless error evaluation, death would be the resultant sentence. This Court should grant review to present the aberrant outcome which will ensue if the circuit court's decision is left intact.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant a writ of certiorari and reverse that part of the judgment of the Ninth Circuit Court of Appeals which affirmed the grant of sentencing relief, subject to the circuit court promptly conducting a harmless error review in accordance with this Court's precedents.

Respectfully submitted.

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK CHARLES MCKENNA, *Petitioner-Appellee-Cross-Appellant*,	)	Nos. 93-99001 93-99002 D.C. No. CV-90-785-PMP
v.	)	
ED K. MCDANIEL,* Warden of the State of Nevada, *Respondent-Appellant-Cross-Appellee.*	)	OPINION

Appeals from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
May 5, 1994--Pasadena, California

Submission Withdrawn July 20, 1994
Resubmitted November 1, 1994

Filed September 15, 1995

Before: Procter Hug, Jr., Cynthia Holcomb Hall,
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Hug

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*Ed K. McDaniel, who succeeded Salvadore Godinez as Warden of the Ely, Nevada State Prison, is substituted as respondent in this case. Fed. R. App. P. 43(c)(1).

SUMMARY

Criminal Law and Procedure/Capital Cases/Sentencing

The court of appeals affirmed a district court judgment and remanded. The court held that where an aggravating factor was unconstitutional, a capital defendant in the State of Nevada must be resentenced in a proceeding where the remaining valid aggravating factor is weighed against the mitigating evidence.

After a prison inmate, Jack Nobles, was strangled, appellant Patrick McKenna, also an inmate, was charged with first-degree murder. At trial, evidence was presented that McKenna, Nobles and two other inmates, David Denson and David Rossi, were locked down in a cell together on the night of the murder. Rossi testified that he heard McKenna and Nobles arguing and saw McKenna's arm wrapped around Nobles's neck. Another inmate in the cell directly across from Nobles's stated that he saw McKenna and Nobles arguing and saw McKenna choking Nobles. A detective who conducted the investigation into Nobles's murder testified about an interview with McKenna on the day of the murder. The detective testified that he had given McKenna a *Miranda* warning and asked if McKenna could tell him about Nobles's death. The detective stated that McKenna said that he did not "want to implicate anybody."

At McKenna's request, the court appointed his brother, Ken McKenna, an attorney who had graduated from law school one year and a half prior to the appointment, as McKenna's counsel along with another attorney, Kent Robison. Robison was informed that the county would not make cash advances for travel and lodging. Robison withdrew from the case two days after trial began and sent another attorney to replace him.

McKenna was convicted of murder. The jury was instructed on a "depravity of mind" aggravating circumstance.

The jury found two aggravating factors: McKenna was previously convicted of felonies that involved the use or threat of violence, and the crime involved depravity of mind. The jury returned a form stating that it found no mitigating factors sufficient to outweigh the aggravating factors. McKenna was sentenced to death. On direct appeal, the Nevada Supreme Court affirmed the conviction and sentence. After the United States Supreme Court denied McKenna's petition for writ of certiorari, McKenna sought post-conviction relief in state court. A state trial court denied McKenna relief, and the Nevada Supreme Court affirmed. The United States Supreme Court denied McKenna's petition for writ of certiorari.

McKenna filed a petition for a writ of habeas corpus in the district court. The court vacated the death sentence on

the ground that the depravity of mind instruction was unconstitutionally vague. The court denied all of McKenna's other claims for habeas relief.

The State appealed, contending that the district court erred in reaching the constitutionality of the depravity of mind instruction because McKenna procedurally defaulted on that claim in the state court. The State further contended that because there remained one finding of a valid aggravating factor and no mitigating factors, no reweighing was required. McKenna cross-appealed.

[1] McKenna's counsel did not object to the depravity of mind instruction at trial, and the issue was not raised on direct appeal. The first challenge to the constitutionality of the instruction came in the state petition for post-conviction relief. The Nevada Supreme Court stated that McKenna waived the issue as a result of his failing to raise it on direct appeal. The Nevada Supreme Court went on to state that the contention had no merit. [2] In Nevada, the failure to raise constitutional claims on direct appeal does not necessarily bar consideration of those claims on collateral review. The Nevada Supreme Court's statement that McKenna had waived the claim was necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and

did not constitute a clear statement of independent and adequate state grounds for the decision. Thus, the district court was not procedurally barred from examining the merits of McKenna's claims on federal habeas review.

[3] Nevada is a state where aggravating and mitigating factors are balanced against each other at sentencing. [4] In this case, the depravity of mind instruction was nearly identical to other instructions that the Ninth Circuit and other courts have found to be unconstitutionally vague. [5] The special verdict form returned by the jury stated that there were no mitigating circumstances sufficient to outweigh the aggravating factors; this was insufficient to conclude that the jury found no mitigating circumstances. The record demonstrated that McKenna provided some mitigating evidence. Because one of the aggravating factors was unconstitutional, the question became whether the mitigating evidence was sufficient to outweigh the sole remaining aggravating factor. McKenna has to be resentenced in a proceeding where the remaining valid aggravating factor is weighed against the mitigating evidence.

[6] The exclusion of part of McKenna's autobiography, which McKenna had sought to introduce as mitigating evidence, was not constitutional error and was not

prejudicial.

[7] The testimony of the detective and the prosecutor's comment on it did not constitute error under *Doyle v. Ohio*. McKenna did not remain silent, and there was nothing in his response that indicated any admission of guilt.

[8] Counsel was never totally absent or absent at a critical stage. After Robinson withdrew because he was not satisfied with the financial arrangements, the remaining counsel were not prevented from assisting McKenna or interfered with in any way. [9] Though inexperienced, the attorneys could review a complete prior trial record. [10] Failure to file advance notice of an alibi witness did not deprive McKenna of a fair trial.

[11] The case was remanded for entry of a modified order stating that a writ of habeas corpus will be issued with regard to McKenna's sentence unless he is resentenced within a reasonable time period.

COUNSEL

David F. Sarnowski, Chief Deputy Attorney General, Carson City, Nevada, for the respondent-appellant-cross-appellee. John J. Graves, Graves & Leavitt, Las Vegas, Nevada; Cal J. Potter, III, Potter Law Offices, Las Vegas, Nevada, for the petitioner-appellee-cross-appellant.

Michael Pescetta, Nevada Appellate and Postconviction Project, Las Vegas, Nevada, for the amicus curiae.

OPINION

HUG, Circuit Judge:

Petitioner, Patrick Charles McKenna, filed a petition for a writ of habeas corpus contesting the validity of his conviction for first-degree murder, a crime for which he was sentenced to death. The district court upheld the conviction but held that the jury instruction regarding depravity of mind was unconstitutionally vague as given to the jury and, therefore, was an impermissible aggravating circumstance upon which to base a sentence of death. The State appealed the ruling on the sentence and McKenna cross-appealed, claiming constitutional errors relating to both his conviction and sentence. We affirm the district court's decision denying relief from the conviction but granting relief concerning the death sentence. We remand for the district court to enter an order granting the writ of habeas corpus with regard to the death sentence unless the State resentences McKenna within a reasonable period of time.

FACTS AND PROCEDURAL HISTORY

McKenna was imprisoned after conviction for rape at age 17 in 1964. In 1976, McKenna was paroled. Less than

two years later, he was arrested for the rape and robbery of two women. McKenna was later charged and convicted of one count of robbery, two counts of second-degree kidnapping and using a weapon to commit the crimes, and three counts of sexual assault. *See McKenna v. State of Nevada,* 705 P.2d 614, 622 (Nev. 1985), *cert. denied, McKenna v. Nevada,* 474 U.S. 1093 (1986). After the court announced the verdict, McKenna returned to his cell. The next morning another inmate, Jack Nobles, was found dead in cell 4A2. The cause of death was ligature strangulation.

Evidence was produced at trial that McKenna, Nobles, and two other inmates, David Denson and David Rossi, were locked down in cell 4A2 together that night. Rossi testified that while he was sleeping in the bottom bunk with Nobles in the top, he awoke and observed McKenna coming toward the bunk. He then heard McKenna and Nobles arguing in whispers. McKenna stood on the toilet at the bottom of Rossi's bunk, positioning himself over Nobles. Rossi stated that he heard grunting and wheezing and felt vibrations "like feet kicking." McKenna then partly pulled Nobles off the top bunk. Rossi observed blood running down McKenna's arm, which was wrapped around Nobles's neck. Rossi testified that McKenna turned Nobles loose three-to-five minutes later,

placed him back in his bunk, and covered him with a blanket.

The testimony of another inmate, Michael Dennis Jones, who was in the cell directly across from cell 4A2 that night, was read into the record.[1] Jones's testimony stated that he saw McKenna and Nobles arguing and then saw McKenna choking him. Nobles's knees buckled and he dropped to the ground. Rossi helped McKenna place Nobles back in the top bunk.

Denson stated that the next morning, before leaving for breakfast and before Nobles's body was found, McKenna asked him to pass a homemade knife, the handle of which was wrapped with fabric ligature, to another inmate, Seebon Harris, who was in another cell. Harris testified that he did receive the knife from McKenna but, after learning Nobles had been murdered, handed it over to a guard. Harris further testified that during the day of January 5, McKenna was very upset and had struck another inmate without provocation. Harris had spoken with Nobles that day and testified that Nobles was upset and crying and believed McKenna was mad at him. Nobles stated, "Why don't them damn guys just leave me alone."

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[1]After giving his deposition testimony and before McKenna's trial, Jones committed suicide.

McKenna was charged, tried, and convicted for the murder of Jack Nobles. The Nevada Supreme Court overturned his initial conviction, however, because the trial court improperly allowed McKenna's psychiatrist to relate admissions made by McKenna. In August, 1982, McKenna was retried. At McKenna's request, the court appointed his brother, Ken McKenna, an attorney who had graduated from law school a year and a half prior to the appointment, as McKenna's counsel along with another attorney, Kent Robison. Robison withdrew from the case two days after trial started and sent Bruce Beesley, another attorney from his office, to replace him.

The jury again convicted McKenna of murder. The jury found two aggravating factors: 1) McKenna was previously convicted of felonies involving the use or threat of violence; and 2) the crime involved depravity of mind. The jury returned a form stating that it found no mitigating factors sufficient to outweigh the aggravating factors, and sentenced Mckenna to death. The Nevada Supreme Court affirmed McKenna's conviction and sentence on direct appeal. *See McKenna v. State*, 705 P.2d 614 (Nev. 1985). The United States Supreme Court denied McKenna's petition for writ of certiorari, 474 U.S. 1093 (1986).

McKenna then sought post-conviction relief in state court. The district court for the district of Clark County denied relief and McKenna appealed to the Nevada Supreme Court, which vacated McKenna's sentence with instructions to reconsider McKenna's petition. In February 1988, the trial court held an evidentiary hearing and again denied McKenna relief. The Nevada Supreme Court affirmed that decision and, later, denied McKenna's petition for rehearing. The United States Supreme Court again denied McKenna's petition for writ of certiorari. *See McKenna v. Nevada,* 498 U.S. 925 (1990).

In November 1990, McKenna filed a petition seeking a writ of habeas corpus in the Federal District Court for the District of Nevada. On February 20, 1992, the district court overturned McKenna's death sentence, holding that the depravity of mind instruction, which allowed the jury to find depravity of mind as an aggravating circumstance, was unconstitutionally vague. The district court vacated McKenna's sentence, but upheld his convictions. On appeal, we held it was unclear whether the district court had considered all of McKenna's claims for habeas relief, and we remanded for that purpose. The district court clarified its ruling, entering a new order vacating the death sentence on the ground that the depravity of mind instruction was

unconstitutionally vague, but denying all of McKenna's other claims for habeas relief. The State of Nevada now appeals, and McKenna cross-appeals.

The appeals were timely, and we granted a certificate of probable cause. We have jurisdiction pursuant to 28 U.S.C. § 2253.

DISCUSSION

On appeal, the State of Nevada contends first that the district court erred in reaching the constitutionality of the depravity of mind instruction because McKenna had procedurally defaulted on that claim in the state court; and second, that because there remains one finding of a valid aggravating factor and no mitigating factors, no reweighing is required. McKenna cross-appeals, arguing that the district court improperly denied his other claims for habeas relief, contending that there were constitutional errors in both the guilt phase and the penalty phase of his trial.

I. *Depravity of Mind Instruction*

A. *Procedural Default*

At the penalty phase of McKenna's trial, the jury, in a special verdict, found two aggravating circumstances: 1) the murder was committed by a person who was previously convicted of another felony or felonies involving the use or

threat of violence to the person of another; and 2) the murder was committed with depravity of mind. The verdict form further read: "We the Jury, state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances stated." The jury left blank and unsigned a special verdict form that asked them to "designate that the mitigating circumstance or circumstances which have been checked below outweigh any aggravating circumstance or circumstances."

The following instruction was given to the jury on the depravity of mind aggravating circumstance:

> You are instructed that an aggravating circumstance of murder in the first degree is where the murder involved depravity of mind.
>
> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and integrity. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously horrible or inhuman.

The district court found this instruction to be unconstitutionally vague and granted McKenna's petition as to the death sentence. The State of Nevada now argues that

the district court's decision to reach the merits of this issue was error because McKenna procedurally defaulted on this claim in state court.

[1] McKenna's counsel did not object to the depravity of mind instruction at trial, and the issue was not raised on McKenna's direct appeal. McKenna's first challenge to the constitutionality of the depravity of mind instruction came in McKenna's state petition for post-conviction relief. In addressing the issue for the first time, the Nevada Supreme Court stated:

> Appellant next contends the district court erred in rejecting his claim that the jury instruction concerning the aggravating circumstance of depravity of mind violated the eighth and fourteenth amendments of the United States Constitution. Specifically, appellant contends that the trial court failed to properly define depravity of mind for the jury. However, appellant waived this issue by failing to raise it on direct appeal. *See* NRS 177.375; *Craig v. Warden*, 87 Nev. at 40, 482 P.2d at 325-26.
>
> Moreover, the contention has no merit. The jury instruction in question is virtually identical to that approved by this court in *Rogers v. State*, 101 Nev. 457, 705 P.2d 664 (1985), *cert. denied*, 476 U.S. 1130 (1986).

> Finally, we held in appellant's direct appeal that "[t]he circumstances surrounding the murder by ligature strangulation support the jury's finding that the murder involved depravity of mind." *McKenna,* 101 Nev. at 351, 705 P.2d at 622-23. Therefore, any error concerning the jury instruction was harmless and the court below correctly concluded that this contention did not constitute proper grounds for post conviction relief. *See* NRS 178.598.

The State contends that this ruling constitutes a plain statement of procedural default based on independent and adequate state grounds, which precludes federal habeas jurisdiction. In a habeas corpus proceeding, a federal court generally "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 111 S. Ct. 2546, 2553-54 (1991). This doctrine applies to bar federal habeas review when the state court has declined to address the petitioner's federal claims because he failed to meet state procedural requirements. *Id.* at 2254; *see also Sochor v. Florida,* 504 U.S. 527, 119 L. Ed. 2d 326, 337 (1992). Thus, the independent state grounds doctrine bars the federal courts from reconsidering the issue in the context of

habeas corpus review as long as the state court explicitly invokes a state procedural bar rule as a separate basis for its decision. *Harris v. Reed,* 489 U.S. 255, 264 n.10 (1988).

[2] In the present case, it would appear at first blush as if the Nevada Supreme Court made a plain statement that McKenna's challenge to the depravity of mind instruction was procedurally waived because he failed to raise the issue on direct appeal. After noting the possibility of procedural default, however, the court went on to specifically reach the merits of the federal claim. This analysis was necessary to the court's holding because in Nevada failure to raise constitutional claims on direct appeal does not necessarily bar consideration of those claims on collateral review. *See Pertgen v. Nevada,* 875 P.2d 361, 364 (Nev. 1994). In *Pertgen,* the Nevada Supreme Court stated:

> Moreover, the power of this court to address plain error or issues of constitutional dimension *sua sponte* is well established. Because this case involves the ultimate punishment and because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, we will consider appellant's claims on the merits.

Id. (citations omitted). Thus, the court's refusal to entertain

McKenna's complaints on collateral review, at best, represents a refusal to exercise discretion to hear the claim. This is insufficient for the State to invoke the procedural bar doctrine. *See Russell v. Rolfs,* 893 F.2d 1033, 1035-36 (9th Cir. 1990) ("It is significant in our interpretation that the Washington Supreme Court decided not to exercise its discretionary power—as contrasted with refusing to hear Russell's case because of a procedural bar"). The Nevada Supreme Court's statement that McKenna had waived this claim is, thus, necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision. *Coleman,* 111 S. Ct. at 2557. We conclude, therefore, that the district court was not procedurally barred from examining the merits of McKenna's claims on federal habeas corpus review.

B. *Requirement to Reweigh*

[3] Nevada is a "weighing" state, *i.e.*, a state where "the ultimate sentencing decision turns on weighing the statutory aggravating factors against the mitigating evidence." *Jeffers v. Lewis,* 5 F.3d 1199, 1203 (9th Cir. 1992), *rev'd on other grounds,* 38 F.3d 411 (9th Cir. 1994) (en banc). In a weighing state where the aggravating and mitigating factors

are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors remain. *Stringer v. Black,* 503 U.S. 222, 229-32, 112 S. Ct. 1130, 1136-37 (1992).

[4] In the present case, the depravity of mind instruction was nearly identical to other instructions that this and other courts have found to be unconstitutionally vague. *See, e.g., Godfrey v. Georgia,* 446 U.S. 420, 428, 433 (1980); *Deutscher v. Whitley,* 946 F.2d 1443, 1447 (9th Cir. 1991), *vacated on other grounds,* 113 S. Ct. 367 (1992); *Jimenez v. State,* 801 P.2d 1366, 1369 (Nev. 1990); *Robins v. State,* 798 P.2d 558 (Nev. 1990), *cert. denied,* 499 U.S. 970, 111 S. Ct. 1608 (1991); *Moran v. State,* 734 P.2d 712, 714 (Nev. 1987), *rev'd., Godinez v. Moran,* 113 S. Ct. 2680 (1993); *Rogers v. State,* 705 P.2d 664, 671 (Nev. 1985), *cert. denied,* 476 U.S. 1130 (1986) (demonstrating Nevada's recognition and application of *Godfrey* principals one week after McKenna's direct appeal and before his collateral appeals).

In McKenna's case, the trial court failed to provide the required limiting instruction that would "distinguish the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey,* 446 U.S. at 427. Thus,

the jury's discretion was unchanneled by clear and objective standards providing specific, detailed guidance that makes rationally reviewable the process for imposing a sentence of death. *Id.* at 428. Nevertheless, the State argues that remand is unnecessary because another aggravating factor exists, and the jury specifically found no mitigating factors. We disagree.

The Supreme Court has held that invalidation of an aggravating circumstance does not automatically require the reviewing court to vacate a death sentence and remand for a new sentencing proceeding before a jury. Where at least one other aggravating factor exists, the state high court, instead, may either reweigh or conduct a harmless error analysis. *Clemons v. Mississippi,* 494 U.S. 738, 748-49 (1990); *see also Jeffers,* 38 F.3d at 414.

Even in a weighing state, however, invalidation of one of several aggravating factors may make no difference if there were no mitigating circumstances against which the state court could balance the remaining aggravating factors. *See Neuschafer v. Whitley,* 816 F.2d 1390, 1393 (9th Cir. 1987). But where some mitigating factors exist, there must either be a new sentencing hearing before a jury or the state appellate court must reweigh or conduct harmless error review in order to give the defendant the individualized consideration required

by the Constitution. *Clemons,* 494 U.S. at 746, 752.

[5] In its published decision on McKenna's direct appeal, the Nevada Supreme Court stated "[t]he jury further found there were no mitigating circumstances." *McKenna,* 705 P.2d at 622. The district court held that the record does not support the Nevada Supreme Court's conclusion. We agree. The special verdict form returned by the jury stated that there were no mitigating circumstances sufficient to outweigh the aggravating factors. This is insufficient to conclude that the jury found no mitigating circumstances. Rather, the form indicates only that the mitigating evidence was insufficient to outweigh the two aggravating factors. The record demonstrates that McKenna did provide some mitigating evidence, including his difficult childhood, his argument that he was a product of the penal system and his value to society as a writer. Because we have found one of the aggravating factors to be unconstitutional, the question now becomes whether the mitigating evidence is sufficient to outweigh the sole remaining aggravating factor. Thus, under *Clemons,* McKenna must be resentenced in a proceeding where the remaining valid aggravating factor found by the jury is weighed against the mitigating evidence. 494 U.S. at 741; *Richmond v. Lewis,* 113 S. Ct. 528, 535 (1992); *Jeffers,* 38

F.3d at 414.

The parties have suggested that this case be certified to the Nevada Supreme Court to resolve the question of the appropriate procedure for resentencing and how this procedure should be accomplished under Nevada law. We conclude that this is a question of Nevada law best resolved by the Nevada state courts in the context of a Nevada criminal case, rather than by a certification process in the context of a federal habeas corpus proceeding. Therefore, we express no opinion on the proper procedure Nevada should employ when resentencing McKenna.

II. *McKenna's Other Claims for Relief*

In his cross-appeal, McKenna challenges the district court's denial of his other grounds for habeas corpus relief. Specifically, McKenna contends the district court erred by denying relief for: 1) the trial court's refusal to admit McKenna's autobiography as mitigating evidence in the penalty phase of his trial; 2) his claims of prosecutorial misconduct; 3) the trial court's denial of McKenna's motion for a new trial based on new evidence; and 4) his claims of ineffective assistance of counsel at trial and on direct appeal.

We review *de novo* the decision to grant or deny a petition for writ of habeas corpus. *Thomas v. Brewer,* 923

F.2d 1361, 1364 (9th Cir. 1991). State court findings of fact are entitled to deference under 28 U.S.C. § 2254(d), and we review the federal district court's findings of fact for clear error. *Strickland v. Washington,* 466 U.S. 668, 698 (1984). Because ineffective assistance of counsel claims are mixed questions of law and fact, we review them *de novo. United States v. Birtle,* 792 F.2d 846, 847 (9th Cir. 1986). In reviewing claims of trial error on habeas review, we must determine whether the alleged errors had "substantial and injurious affect or influence" on the jury's verdict. *Brecht v. Abrahamson,* 123 L. Ed. 2d 353, 367, 373 (1993). Habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. *O'Neal v. McAninch,* 115 S. Ct. 992, 994-95 (1995). It is the responsibility of the court, once it concludes there was error, to determine whether the error affected the judgment. If the court is left in grave doubt, the conviction cannot stand. *Id.*

A. *McKenna's Autobiography*

At the penalty phase of his trial, McKenna sought to reopen his case and introduce the first six chapters of his autobiography as mitigating evidence. Although we hold that McKenna's sentence of death cannot be upheld unless it is done in a resentencing proceeding that eliminates consideration

of the invalid aggravating factor, this issue remains pertinent in the event the Nevada Supreme Court engages in a reweighing process.

McKenna claimed the autobiography would show: 1) his difficult childhood; 2) his negative experiences with juvenile corrections authorities; and 3) his ability to contribute to society as a writer. The trial court refused to admit the biography. On direct appeal, the Nevada Supreme Court affirmed the trial court's decision. *McKenna,* 705 P.2d at 620-21. McKenna asserts that these decisions violated his Eighth Amendment right to individualized sentencing.

[6] The Supreme court stated in *Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982) that in considering the death penalty, " 'the sentencer [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " (quoting *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (emphasis in original)). Although a defendant is entitled to present this substantive evidence, this does not entitle the defendant to present it through any means he chooses. McKenna was certainly entitled to present evidence of his difficult childhood, his negative experiences with juvenile

authorities, and his writing ability through his own testimony and that of other witnesses. This does not mean it was constitutional error not to allow him to do so through his own written autobiography. McKenna did not choose to testify as to these facts, although he was not precluded from doing so. Other witnesses appearing on his behalf testified as to the substance of the facts contained in the autobiography, and the State conceded his writing ability. The autobiography, itself, would have been cumulative. Its exclusion from the hearing was not constitutional error and was not prejudicial.

B. *Prosecutorial Misconduct*

McKenna asserts two grounds of prosecutorial misconduct. The first relates to the guilt phase of the trial; the second relates to the penalty phase.

1. *Guilt Phase*

McKenna contends that the prosecution violated *Doyle v. Ohio,* 426 U.S. 610 (1976), by commenting on McKenna's silence after he was arrested and given his *Miranda* warning. The factual basis for the argument is the testimony elicited from Detective Burton Levos, who conducted the investigation into the murder of Nobles. Detective Levos testified about two separate interviews with McKenna. The first was on January 6, 1979, the day of the murder. Detective Levos

testified he had given McKenna a *Miranda* warning and had him sign a card acknowledging his rights. The prosecutor asked Detective Levos whether he had then conducted a short interview with McKenna. Detective Levos responded:

> Yes. I asked him whether he could tell me about the death of J. Nobles. He said, "I don't want to talk about it. I don't want to implicate anybody and I won't give you a written statement."

The second interview took place on January 8, 1979, two days after McKenna was arrested for the murder. The interview was initiated by a letter from McKenna to Detective Levos, stating that he wanted to make a deal. Detective Levos testified that he asked McKenna "Are you involved in the case of the jail in reference to Nobles's murder"? He further testified that when this question was put to McKenna, McKenna looked at him, nodded yes, and smiled. On direct appeal, McKenna argued that the response at the January 8 interview was privileged as a plea negotiation. He does not renew that argument here.

[7] McKenna's current argument relates solely to the first interview on January 6 and a claim that the testimony elicited on that date constituted *Doyle* error. The precise issue presented in *Doyle* was whether a prosecutor could use a

defendant's post-arrest silence to impeach the defendant's exculpatory testimony, 426 U.S. at 616. The Court held that in light of *Miranda's* explicit recognition that one has a constitutional right to remain silent, the prosecutor could not use the defendant's decision to exercise that right as a tool of impeachment. *Id.* at 617. McKenna argues that the state violated *Doyle* when the prosecutor elicited Levos's testimony concerning McKenna's response at the January 6 interview. McKenna further contends that it was error when the prosecutor, in his closing argument, commented on this testimony, stating:

> He [Levos] advised Mr. McKenna of his Constitutional rights and they then had a short interview and Mr. McKenna suggested he had information but he didn't want to talk about who killed Nobles. In fact, he said he didn't want to give any kind of written statement.

Because no objection or motion to strike was made either to the testimony or the closing argument, we review for plain error. The testimony of Detective Levos and the prosecutor's comment thereon do not constitute *Doyle* error. McKenna did not remain silent. More importantly, there is nothing in his response on January 6 that indicates any sort of admission of guilt. Instead, it indicates a desire not to implicate someone

else. Thus, even if it were error it was harmless beyond a reasonable doubt.

2. *Penalty Phase*

McKenna alleges that the prosecution made an intentional and prejudicial misstatement of the law in summation to the jury during the penalty phase of the trial. Because we hold that McKenna must be resentenced either by the court or at a new penalty hearing, any error that may have occurred will not be of consequence.

C. *Refusal to Grant a New Trial*

Five months after McKenna's conviction and sentence, attorney Ken McKenna obtained a handwritten statement from Rossi, who was then incarcerated in Idaho, recanting his testimony and contending that he was pressured into giving it. The trial court heard argument and then denied the motion. In evaluating Rossi's recantation, a court obviously considers the strength of that assertion in light of the impeachment that would result from any such testimony. In this case, the impeaching evidence would be very strong. Rossi would had to have committed perjury on three separate occasions: the preliminary hearing, the first trial, and the second trial. In light of this history, it is questionable what Rossi's testimony might actually be when the time came down to a new trial.

Furthermore, the other evidence of McKenna's guilt was very strong. Under the *Brecht* standard, the denial of the new trial was not error and did not result in prejudice to McKenna.

D. *Ineffective Assistance of Counsel*

McKenna argues that he received ineffective assistance of counsel at trial and on his direct appeal, thus, violating his Sixth Amendment right to a fair trial. In analyzing an ineffective assistance of counsel claim, our overriding concern is to determine whether counsel's conduct so undermined the functioning of the adversary process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington,* 466 U.S. 668, 686 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at *687.* Review of counsel's performance is highly deferential, and we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689.

1. *Assistance of Trial Counsel*

McKenna argues that the State interfered with his counsel's ability to assist him at trial by effectively driving away the only experienced member of the defense team when the county failed to advance expenses to attorney Kent Robison. He contends that this left him with only the assistance of his inexperienced brother, attorney Ken McKenna, and another slightly more experienced attorney Bruce Beesley.

McKenna had initially requested that his brother be appointed to represent him. His brother sought the assistance of Kent Robison, a more seasoned defense attorney, to perform as co-counsel. The trial court appointed Ken McKenna and Robison to perform as co-counsel. On the second day of *voir dire,* Robison was informed that the county would not make cash advances for travel and lodging. Robison, claiming financial hardship to his law firm, sought and was granted withdrawal from the case. Robison later sent Bruce Beesley, an associate from his firm, to assist McKenna at trial. Ken

McKenna was left for three days as the only attorney for the defense.

The Nevada Supreme Court found that "counsel withdrew not because the county denied him compensation, but merely because the county declined to compensate him in advance." In seeking to withdraw from representing a client charged with murder after the trial has started because the county would not advance his expenses, attorney Robison has demonstrated ethical standards that fall far short of responsible professional conduct. It is also difficult to understand why a state trial court would grant such a request when the result was to leave McKenna's defense in the hands of inexperienced counsel. Our inquiry, however, is to determine whether the performance of the remaining counsel was constitutionally deficient and prejudicial.

McKenna asserts that the County's refusal to advance costs constitutes state interference with counsel that creates a mandatory presumption of prejudice. McKenna relies on the following statement from *Strickland:* "Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." 466 U.S. at 692 (citing *United States v. Cronic,* 466 U.S. 648, 659, n.25 (1983)).

In *Cronic,* the Court described the type of situation from which prejudice is presumed. When counsel is totally absent, is prevented from assisting the accused at a critical stage of the proceeding, or when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, we will presume prejudice. *Cronic,* 466 U.S. at 659 & n.25.

[8] None of these situations apply here. Counsel was never totally absent or absent at a critical stage. McKenna was at all times represented by counsel. One of McKenna's counsel, Kent Robison, chose to withdraw because he was not satisfied with the financial arrangements. The remaining counsel were not prevented from assisting McKenna, nor were they interfered with in any way.

[9] These attorneys, though inexperienced, did have the advantage of being able to review a complete prior trial record, where experienced trial counsel represented McKenna. The question is whether the representation given by these attorneys was deficient and whether any deficiencies in performance were prejudicial.

(a) *Failure to File a Notice of Alibi*

At trial, counsel sought to call inmate Frank DePalma as a defense witness. DePalma was expected to testify that the victim had violent propensities and, on the night of the

murder, he saw McKenna locked in a different cell than the one where the victim was found. The trial court refused to allow DePalma to testify, stating that he was an alibi witness and counsel had not filed a notice of alibi ten days prior to trial as required by NRS 174.087. The record shows that the required notice would had to have been filed during the time Kent Robison was still participating as co-counsel. All three defense attorneys were questioned as to why a notice of alibi witness was not filed. Both Robison and Beesley were unaware of the existence of a potential alibi witness. Attorney McKenna stated that he was aware of the witness but was unaware of the procedural advance notice requirement.

[10] Assuming that the failure to file the advance notice of an alibi witness was deficient performance, we conclude that this failure "was not so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. On the evening of January 5, 1979, McKenna was housed in cell 4A2 with Rossi, Denson, and Nobles. The next day, January 6, at 7:25 a.m., the body of Nobles was discovered in cell 4A2. The cause of death was asphyxia from ligature strangulation. The estimated time of death was between the late evening hours of January 5 and the early morning of January 6.

Two eye witnesses, Rossi and Jones, not only saw McKenna in cell 4A2, but witnessed the murder. Cellmate Denson testified that the next morning, before prison officials had discovered that Nobles was dead, McKenna asked him to pass a homemade knife wrapped with fabric ligature to Harris, another inmate; Harris testified that he received this weapon.

In light of this overwhelming evidence and McKenna's own adoptive admission, we conclude that DePalma's expected testimony that he had seen McKenna playing poker in another cell would not have been given credence or affected the verdict.

(b) *Failure to Object to Levos's Testimony*

McKenna contends that counsel was ineffective in failing to object to Detective Levos's testimony concerning his first interview with McKenna because the testimony constituted *Doyle* error. As we earlier discussed in section IIB 1, this testimony did not constitute *Doyle* error and was not prejudicial and, thus, this claim is unavailing.

(c) *Failure to Accomplish the Admission of Toxology Report.*

In questioning the medical examiner, counsel did not seek admission into evidence of a toxology report showing that the victim had morphine in his bloodstream at the time of his

death. McKenna argues that this evidence would have lessened sympathy for the victim. We conclude that this does not constitute deficient performance nor prejudice under the *Strickland* standard.

(d) *Failure to Perfect Appeal From Order Denying New Trial.*

Defense counsel did not perfect its appeal from the order denying a new trial based on Rossi's recantation of his testimony. First, we note that there was no prejudice from the failure to appeal because it was fully considered by the Nevada Supreme Court on the habeas petition. Furthermore, as we concluded in section IIC, the denial of a new trial was not constitutional error.

2. *Assistance of Appellate Counsel*

McKenna contends that the brief on direct appeal was prepared by a law clerk with inadequate supervision or review by appellate counsel. The issue is not how the brief was prepared, but the adequacy of the brief. McKenna has failed to identify any deficiencies that could have affected the outcome of the appeal. This does not constitute ineffective assistance of counsel.

III. *CONCLUSION*

[11] We affirm the district court's denial of McKenna's petition for a writ of habeas corpus as to his conviction of first-degree murder. We also affirm the district court's decision to grant the petition as to his sentence of death unless he is resentenced within a reasonable period of time. The wording of the order requires clarification so as to specify that the writ is not granted at this time but will be granted if McKenna is not resentenced. The judgment of the district court is AFFIRMED, and the case is REMANDED to the district court for entry of a modified order stating that a writ of habeas corpus will be issued with regard to McKenna's sentence unless he is resentenced within a reasonable period of time.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

PATRICK CHARLES McKENNA, Petitioner, vs. SALVADOR GODINEZ, et al., Respondents.	CV-S-90-785-PMP(LRL) **MEMORANDUM DECISION AND ORDER**

Judgment was entered (#31) in this action on February 20, 1992, granting the writ of habeas corpus and vacating the sentence of death without prejudice to re-sentencing because one of the aggravating circumstances supporting the death sentence was unconstitutionally vague. An order of mandate (#48) was filed on November 4, 1992, pursuant to the decision from the Ninth Circuit Court of Appeals (#46) remanding this action for an adjudication of all guilt phase and sentencing phase issues. In this court's prior order granting the writ regarding the sentence, the undersigned stated:

> Although Petitioner has raised five (5) grounds for relief,[1] this order will only address the one claim which is meritorious: that the depravity of mind aggravating circumstance was unconstitutionally vague.
>
> [1] The other four (4) grounds for relief are: the trial court erred when it did not allow his autobiography to be admitted into evidence during the penalty phase; the cumulative effect

> of alleged prosecutorial misconduct resulted in an unfair trial; the denial of his motion for a new trial; and ineffective assistance of trial and appellate counsel.

Lines 19 - 26, p.1, docket #30. The appellate court stated that this was "not a definitive ruling on the remainder of the claims because the district court indicated it only addressed one claim, leaving in doubt whether the other claims were actually adjudicated." Page 1, docket #46.

The undersigned intended for the prior order (#30), and judgment thereon (#31), to be a definitive ruling on the remainder of the claims. The undersigned stated that it would analyze the only claim which was meritorious; conversely, the remainder of the claims were determined to be without merit. The record and the arguments of the parties regarding the other grounds for relief, as presented by Petitioner's counsel (#11) in his points and authorities in support of the petition and by Respondents in their Answer (#21), were carefully reviewed, considered, and determined to not merit an in-depth discussion. The prior order (#30) and judgment thereon (#31) were unaffected by the appellate court's decision to remand for further consideration. Consequently, they shall remain in force. On December 11, 1992, this Court conducted a hearing at which the parties were given the opportunity to address the

Order of the Ninth Circuit Court of Appeals (#46) and at which this Court clarified its memorandum decision and order of February 20, 1992 (#30).

IT IS THEREFORE **ORDERED** that the writ of habeas corpus is DENIED based on grounds I (the trial court erred when it did not allow his autobiography to be admitted into evidence during the penalty phase), III (the cumulative effect of alleged prosecutorial misconduct resulted in an unfair trial), IV (the denial of this motion for a new trial), and V (ineffective assistance of trial and appellate counsel).

IT IS FURTHER **ORDERED** that, pursuant to this court's prior order (#30) and judgment thereon (#31) (which were unaffected by the appellate court), the writ of habeas corpus is GRANTED based on ground II (unconstitutionality of the depravity of mind aggravating circumstance). The death sentence is therefore VACATED WITHOUT PREJUDICE to further proceedings by the state for redetermination of the sentence. The Clerk of the Court shall enter judgment accordingly.

Dated this 11th day of December, 1992.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

PATRICK CHARLES McKENNA, Petitioner, vs. SALVADOR GODINEZ, et al., Respondents.	**JUDGMENT IN A CIVIL CASE** Case Number: CV-S-90-785-PMP(LRL)

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to/be considered by the Court. The issues have been/considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED The Writ of Habeas Corpus is GRANTED based on ground II (unconstitutionality of the depravity of mind aggravating circumstance). The death sentence is therefore VACATED WITHOUT PREJUDICE to further proceedings by the state for redetermination of the sentence.

December 14, 1992 — *Date*

CAROL C. FITZGERALD — *Clerk*

/s/

(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

PATRICK CHARLES McKENNA, Petitioner, vs. SALVADOR GODINEZ, et al., Respondents.	**JUDGMENT IN A CIVIL CASE** Case Number: CV-S-90-785-PMP(LRL)

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to/be considered by the Court. The issues have been/considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED The Writ of Habeas Corpus is GRANTED based on ground II (unconstitutionality of the depravity of mind aggravating circumstance). The death sentence is therefore VACATED WITHOUT PREJUDICE to further proceedings by the state for redetermination of the sentence.

December 14, 1992 — *Date*

CAROL C. FITZGERALD — *Clerk*

/s/
(By) Deputy Clerk

OPINION

PER CURIAM:

On August 30, 1982, Patrick Charles McKenna was convicted of the first degree murder of a fellow inmate in the Clark County jail, for which he was sentenced to death.[1] Having reviewed the record on appeal, we conclude that appellant's assignments of error are without merit and we, therefore, affirm his conviction and sentence.

FACTS

The body of 20 year old Jack Nobles, serving a sentence for burglary, was discovered in cell 4A2 of the Clark County jail at approximately 7:25 a.m. on January 6, 1979. A medical expert stated that asphyxia from ligature strangulation was the cause of death. He estimated that death occurred between the late evening hours of January 5, 1979 and the early morning hours of January 6, 1979.

January 5, 1979 was a Friday, and as was customary, inmates moved freely about the cell block until early the next morning, when they were confined to their cells. A majority of the witnesses testified that lockdown occurred at approximately 2:30 a.m. on January 6, 1979.

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[1]This was McKenna's second trial on this charge. The first conviction was reversed in McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982).

Substantial evidence established that after lockdown on January 6, 1979, Nobles was confined in cell 4A2 with McKenna, David Rossi and David Denson.

Denson testified that when he fell asleep after lockdown, between 2:30 and 3:00 a.m., Rossi was in bed, and McKenna and Nobles were playing chess. Denson stated that before leaving the cell for breakfast, and prior to discovering that Nobles had been murdered, McKenna asked him to pass a shank, or homemade knife, the handle of which was wrapped with fabric ligature, to inmate Seebon Harris.

Rossi, testified that he witnessed McKenna murdering Nobles. He was awakened by Nobles climbing into the upper bunk of the bed, and a short time later, he noticed McKenna coming towards the bunk. Rossi heard McKenna and Nobles arguing in whispers, but could only make out the word "chess." Next, McKenna, using the toilet and the bottom of Rossi's bunk for footing, positioned himself over Nobles' bed. Rossi testified he then heard a wheezing sound. Several seconds later, he saw McKenna choking Nobles. Blood was running down McKenna's arm, and he did not turn Nobles loose until 3 to 5 minutes had elapsed. Then McKenna put Nobles back onto his (Nobles') bunk and covered him with a blanket.

The testimony of Michael Dennis Jones was read into the record. Jones, who committed suicide prior to the trial, was in a nearby cell at the time of Nobles' death, and had testified for the state at McKenna's preliminary hearing. At about 1:30 a.m. On January 6, 1979, Jones observed McKenna and Nobles having an argument relative to a sexual act, during which McKenna shoved Nobles against a bunk bed and choked him. Nobles' knees buckled, and he dropped to the ground. Jones further testified that while this was taking place, Rossi was in his bed and Denson was asleep. According to Jones, after Nobles dropped to the ground, Rossi helped McKenna lift Nobles to his bunk.

Seebon Harris testified that on the morning of January 6, 1979, he received the shank that had been passed from McKenna to Denson. Upon learning that Nobles had been murdered, Harris gave it to a guard. Harris also related that McKenna was very upset on January 5, 1979[2], and that just prior to dinner he struck another inmate without provocation. Harris also talked with Nobles shortly before dinner on January 5, 1979. Nobles, upset and crying, stated that

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[2]January 5, 1979 was the day McKenna was convicted of one count of robbery, two counts of second degree kidnapping with a weapon and three counts of sexual assault.

McKenna was mad at him, and then said, "Why don't them damn guys just leave me alone."

Detective Burton Levos was the state's last witness. During an interview conducted January 8, 1979, he asked McKenna, "Are you involved in the case of the jail in reference to Nobles' murder?" When the question was completed, McKenna looked at him, nodded yes, and smiled.

The defense attempted to impeach most of the state's witnesses by showing that they received lenient treatment after giving information implicating McKenna.

The defense elicited testimony through inmates Ronnie Lee Jones and William Wirsen that Nobles was inclined to argue.[3] Jones testified that Rossi and Nobles were engaged in a dispute over a chess game the night before Nobles' body was discovered. Jones also said that during the argument he heard a noise like someone hitting the cell bars or the floor.

The defense stressed the inconsistency between Rossi's testimony that McKenna had choked Nobles with his arms and the medical expert's testimony that the cause of death was asphyxia due to ligature strangulation.

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[3]Rossi, Denson and Harris testified that Nobles was not a belligerent person.

QUALIFICATION OF JURORS IN A DEATH PENALTY CASE

During voir dire two prospective jurors, Jackson and Rosa, expressed reservations about the death penalty. The trial judge excluded both for cause. Appellant contends that exclusion of these potential jurors violated the standards established in Witherspoon v. Illinois, 391 U.S. 510 (1968), reh'g. denied, 393 U.S. 898 (1968), and its progeny. We disagree.

Initially, we note that appellant did not object to the exclusion of Jackson, and his objection to the exclusion of Rosa was untimely. Appellant's omission and delay in objecting are significant under the new interpretation placed on Witherspoon by Adams v. Texas, 448 U.S. 38 (1980) and Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985). The Wainwright court stated that appellant's failure to object was an indication of his contemporaneous impression that the juror was biased and properly excluded.

In Wainwright, id. at 852, the Supreme Court elucidated further on the Witherspoon standard by stating:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in

> addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." [Footnote omitted.]

The Supreme Court also emphasized the discretionary role of the trial judge when it stated:

> Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 852-853.

Accordingly, we conclude that the trial judge did not err in excluding prospective jurors Rosa and Jackson.

McKenna also contends that the jury was devoid of persons unalterably opposed to the death penalty and was therefore biased in favor of the prosecution during the guilt phase of the trial. Additionally, appellant contends such a jury violated his right to fair trial because the jury was an unrepresentative cross-section of the community.

We note initially that this issue was not raised in the

trial court by either a timely objection or a request for an evidentiary hearing. Furthermore, under Witherspoon, we are not required to presume that a death-qualified jury is biased in favor of the prosecution. Rather, the accused has the burden of establishing the non-neutrality of the jury. Witherspoon, 391 U.S. at 520, n. 18. See also Hovey v. Superior Court of Alameda Cty., 616 P.2d 1301 (Cal. 1980) (rejecting appellants' non-neutrality studies because of their failure to take into account that California excludes persons who would automatically vote for the death penalty, as well as those who would automatically vote against it), Rowan v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984) (noting that the crucial question is whether a death-qualified jury is likely to convict innocent people); Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985) (holding a death-qualified jury does not deprive a defendant of a fair and impartial jury even if, on the average, it would favor the prosecution). Because McKenna failed to prove the non-neutrality of the jury which convicted and sentenced him, we reject this assignment of error.

RULINGS ON EVIDENCE AND TESTIMONY

Detective Burton Levos testified concerning appellant's nonverbal response to Levos' question: "Are you involved in the case of the jail in reference to Nobles' murder?"

McKenna's response, a look, a nod yes, and a smile, was made at an interview conducted on January 8, 1979.[4]

McKenna first contends that his nonverbal response was privileged as a plea negotiation under NRS 48.125.[5] "In determining whether a discussion can be properly characterized as a plea negotiation, we must consider the accused's subjective expectation of negotiating a plea at the time of discussion, and the reasonableness of that expectation." See U.S. v. O'Brien, 618 F.2d 1234, 1240-1241 (7th Cir. 1980), cert. denied, 449 U.S. 858 (1980), citing U.S. v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978).

McKenna was informed by Levos that he and Detective Samolovitch lacked authority to make deals, but that he would relay any information to the District Attorney's office. He also testified that he asked McKenna to read the "Miranda Person Arrested Rights Card" out loud at the beginning of the interview and McKenna indicated that he understood its

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[4]Appellant, when first interviewed on January 6, 1979, refused to say anything. The January 8, 1979 interview was prompted by a letter McKenna wrote to Detective Samolovitch, stating his desire to "make a deal" by giving them information about unsolved crimes.

[5]NRS 48.125(1) reads: "1. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or any other crime is not admissible in a criminal proceeding involving the person who made the plea or offer."

contents.

The facts clearly show that McKenna could not have entertained a reasonable expectation that Levos and Samolovitch were authorized to negotiate a plea. Blackwell v. State, 663 P.2d 12, 15 (Okl. Crim. App. 1983). Therefore, we reject this assignment of error.

Next, appellant now contends that his response was ambiguous and therefore inadmissible under our holding in Harrison v. State, 96 Nev. 347, 608 P.2d 1107 (1980). No objection was made at trial to the admission of the nonverbal response on the ground it was ambiguous.

In Harrison we stated: "If an incriminating statement is heard and understood by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the statement is admissible at trial." Id. at 349. See also LeGrenade v. Gordon, 299 S.E.2d 809, 814 (N.C. App. 1983). McKenna responded to Levos' question whether he was involved in the Nobles murder by nodding yes and smiling. Appellant's nonverbal response was not ambiguous and was properly admitted into evidence.

The homemade knife, trapped in fabric ligature, which McKenna sought to dispose of on the morning of January 6, 1979, was admitted into evidence. Appellant contends that it

was error to permit introduction of the knife or a picture of it because it was prejudicial and irrelevant. We disagree.

Appellant has failed to show that the trial court erred in determining the knife's probative value outweighed its prejudicial impact. Lucas v. State, 96 Nev. 428, 431-432, 610 P.2d 727, 730 (1980). The knife, partially wrapped in fabric ligature, was relevant where the cause of Nobles' death was due to ligature strangulation.[6] The evidence also tended to prove appellant's knowledge that a crime had been committed.[7]

On redirect examination, respondent asked Rossi questions about Nobles' character which exceeded the scope of the cross-examination. Appellant argues that the trial court denied him a fair trial by refusing his counsel the right to recross-examine with regard thereto. We hold that the trial

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[6]NRS 48.015 reads: "As used in this chapter, 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

[7]NRS 48.045(2) reads:

> 2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

court did not abuse its discretion in refusing to permit recross-examination on Nobles' character which was a collateral[8] matter. See Farmer v. State, 507 P.2d 1303, 1307 (Okl. Crim. App. 1973). Absent a showing of prejudice, we reject appellant's contention that he was thereby denied a fair trial.

Six days before trial, appellant filed a motion seeking production of Frank DePalma and five other witnesses. McKenna's trial began on August 16, 1982, but witnesses did not present testimony until August 20, 1982. The trial judge denied McKenna's motion for the production of DePalma on August 24, 1982, citing noncompliance with NRS 174.087.[9]

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[8]Nobles' character would have been relevant with proof that another person may have committed the crime, People in Interest of R.L., 660 P.2d 26, 28 (Colo. App. 1983); Dorsey v. State, 96 Nev. 951, 954, 620 P.2d 1261, 1263 (1961), or if appellant contended he killed in self-defense.

[9]NRS 174.087, in pertinent part, reads:

> 1. A defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than 10 days before trial or at such other time as the court may direct, file and serve upon the district attorney a written notice of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as are known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi.
>
> . . .
>
> 4. If a defendant fails to file and serve a copy of such

Appellant's offer of proof related that DePalma would testify that Nobles was belligerent and had broken his (DePalma's) jaw in a fight, and that on the night of the murder, McKenna was locked in a cell where a poker game was taking place, not cell 4A2 where Nobles' body was discovered.

McKenna argues that because DePalma's testimony was not alibi evidence, the judge erred in not allowing DePalma to testify.[10] If DePalma's testimony was not to establish an alibi, it was cumulative because both Ronnie Lee Jones and Wirsen had testified that Nobles was prone to become involved in fights. However, it appears from the record that the major thrust of the testimony was to place McKenna in another cell

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> notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purposes of proving an alibi if the name and address of such witness, as particularly as is known to the defendant or his attorney, is not stated in such notice.

[10]McKenna's argument is premised upon the fact that the medical expert placed the time of death between the late evening hours of January 5, 1979 and the early morning hours of January 6, 1979; that inmates freely moved about the cell-block before lockdown; and that even if a prisoner was locked in the wrong cell (DePalma believed appellant was locked in the cell where the poker game was being played) he could have moved afterwards; therefore, McKenna had an opportunity before and after lockdown to commit the offense.

after lockdown, and therefore it was alibi evidence subject to NRS 174.087. In either event, we conclude the trial court did not abuse its discretion in refusing to permit DePalma to testify.

McKenna next contends that if DePalma was an alibi witness, the trial judge erred in not excusing appellant's noncompliance with NRS 174.087. If "good cause" is shown, a court may exercise its discretion to admit alibi testimony in spite of noncompliance with NRS 174.087. Founts v. State, 87 Nev. 165, 483 P.2d 654 (1971). The proffered testimony in this case appeared for the first time approximately three and one-half years after the murder and following the close of the prosecution's case. McKenna failed to demonstrate, either at trial or on appeal, that good cause existed for the belated production of DePalma. We conclude, therefore, that the exclusion of this testimony was not error. See Reese v. State, 95 Nev. 419, 596 P.2d 212 (1979); Founts v. State, supra.

PENALTY PHASE

Appellant moved to reopen his case during the penalty phase, to introduce the first six chapters of his autobiography. He contended the autobiography was relevant in that it contained evidence of (1) his difficult childhood, (2) his negative experiences with juvenile corrections authorities, and

(3) his ability to contribute to society as a writer. The trial judge refused to admit the autobiography into evidence. Although in a capital case the court should interpret mitigating evidence broadly,[11] we are not persuaded that the trial judge erred in excluding McKenna's autobiography.

The state conceded appellant's writing ability and several witnesses testified that McKenna wrote extensively. McKenna's childhood difficulties and his problems with juvenile authorities were also presented in detail. Thus, the substance of matters contained in the autobiography was brought to the attention of the jury. Accordingly, we conclude that appellant has not demonstrated that excluding his autobiography was prejudicial error, State v. Boyd, 319 S.E.2d 189, 198 (N.C. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 2052 (1985).

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[11]Generally, rules governing the admissibility of evidence at trial do not apply at a sentencing hearing. State v. Conn, 669 P.2d 581, 582-583 (Ariz. 1983). In Bishop v. State, 95 Nev. 511, 516, 597 P.2d 273, 276 (1979) this court noted: "[A] defendant must be given the opportunity to present evidence of whatever mitigating circumstances my be relevant to either the particular offender or the particular offense before a death penalty can be imposed . . . ." NRS 175.552, in pertinent part, state that during a penalty hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which evidence is ordinarily admissible." NRS 200.035 in relevant part the following circumstances, even though the mitigating circumstances is not sufficient to constitute a defense or reduce the degree of the crime:
7. Any other mitigating circumstances."

Furthermore, we find no abuse of discretion in the trial judge's refusal to allow appellant to reopen his case. Williams v. State, 91 Nev. 533, 535, 539 P.2d 461, 462-463 (1975); Accord State v. Boodry, 394 P.2d 196, 198-199 (Ariz. 1964), cert. denied, 379 U.S. 949 (1964).

McKenna next contends that the trial court erred in allowing testimony upon executive clemency and instructing the jury that a sentence of life imprisonment without the possibility of parole could be commuted to life imprisonment with the possibility of parole.

Detailed testimony on the process of executive clemency has never been favored by this court. See Summers v. State, 86 Nev. 210, 467 P.2d 98 (1970); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), cert. denied, 384 U.S. 1012 (1966). We now specifically disapprove its use in any form.[12]

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[12]Responding to a question about the frequency of commutations by the State Board of Pardons Commissioners, Mr. Jeffers, a Chief Deputy of the Clark County District Attorney's office, stated: "Based on my experience it happens more times than it doesn't." Appellant's objective on grounds of relevance was overruled. Appellant chose not to cross-examine on this point.

Our concern is that the witness's ambiguous statement could have been misperceived by the jury. It is unclear just what was meant by "based on my experience." His conclusion would have been misleading if intended to represent that the majority of petitions for commutation are granted. Appellant neglected to cross-examine the witness about his personal experiences, which perhaps would have supported his conclusion that "it

This court's recent decision in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503, 510 (1985), recites how district courts should instruct jurors on the issue of executive clemency, if a request for instruction on the question is tendered. However, Petrocelli antedated the trial of the instant case, and we do not believe, in this case, that a different verdict would have been reached if the procedures set forth in Petrocelli had been followed in the instant case.

The jury was instructed that it could impose the death sentence only if aggravating circumstances outweighed mitigating circumstances; otherwise, the penalty imposed should be life imprisonment. Although appellant concedes that this instruction is consistent with NRS 200.030(4)(a),[13] he

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happens more times than it doesn't."

In holding that appellant has failed to prove that the statement was sufficiently prejudicial to warrant reversal, we note with particularity that: 1) the testimony was ambiguous; 2) the only objection by appellant was on the ground of relevance; 3) the evidence of appellant's guilt was overwhelming; and 4) the jury found no factors mitigating against imposition of the death penalty.

[13]NRS 200.030(4)(a) provides:

> Every person convicted of murder of the first degree shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

contends that the court was under a duty to further instruct the jurors that they had to determine beyond a reasonable doubt that death was the appropriate punishment. We disagree.

First, the instruction given in the case at bar was permissive[14] and not mandatory. It gave the jury the option of imposing the death penalty if they found that aggravating circumstances outweighed mitigating circumstances. Secondly, Nevada's death penalty procedure has been recently upheld by this court. In Ybarra v. State, 100 Nev. 167, 176, 679 P.2d 797, 803 (1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1372 (1985) we stated: "Since our procedure for weighing aggravating and mitigating circumstances provides the sentence with adequate information and guidance and the accused with sufficient guarantees that the penalty of death will not be imposed arbitrarily and capriciously, the challenged statute passes constitutional muster."

Lastly, as the Ninth Circuit Court stated in Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37 (1984): "The United States Supreme Court has never stated that a beyond-a-reasonable-doubt

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[14]The instruction read: "The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

standard is required when determining whether a death penalty should be imposed."

REVIEW OF DEATH PENALTY

NRS 177.055(2)(d) requires that we review a death sentence to determine (1) whether evidence supports the finding of an aggravating circumstance or circumstances; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor; (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in the state, considering both the crime and the defendant.[15]

The jury found two aggravating circumstances: (1) the murder was committed by a person who was previously convicted of another felony or felonies involving the use or threat of violence to the person of another, and (2) the murder involved depravity of mind. The jury further found there were no mitigating circumstances.

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[15]NRS 177.055(2)(d) was recently amended to abolish the proportionality review requirement. This amendment became effective June 6, 1985. 1985 Stats. ch. 527 § 1, at 1597-1598. The prohibition against ex post facto laws requires that we apply the law as it existed when the crime was committed. See Goldsworthy v. Hannifin, 86 Nev. 252, 468 P.2d 350 (1970). In Goldsworthy we held that an act amending parole eligibility could not be applied to the detriment of a defendant whose crime was committed before the amendment took effect. Id. at 256-57. Because Nobles was murdered well before June 6, 1985, we must conduct a proportionality review of appellant's sentence.

A review of the record indicates that the appellant is no stranger to the criminal justice system. From the age of 13 years he had significant involvement with juvenile authorities resulting in his detention in facilities in both Clark and Elko Counties. In 1964, when he was 17 years old, he was sentenced to the Nevada State Prison for a term of 5 to 15 years for crimes of violence. This pattern continued after incarceration. On October 14, 1966, he escaped from the state prison and was picked up shortly thereafter. On January 30, 1967, he was involved in another escape attempt in which two officers were taken hostage. On August 22, 1973, appellant jammed an eleven inch homemade knife into the stomach of a correctional officer, and with other inmates caused significant damage to the facility on that occasion.

He was paroled April 26, 1976, and a short time later picked up for parole violation, allegedly having committed crimes in Washoe County for which he apparently was never tried. On release from the state prison, March 19, 1978, his career of crime and violence continued unabated. A crime spree in July 1978 resulted in a conviction of one count of robbery, two counts of second degree kidnapping with a weapon and three counts of sexual assault. Between August 25 and August 27, 1979, he and other inmates took over the

Las Vegas annex of the Clark County jail, for which he was convicted of attempted escape with the use of a weapon, possession of a firearm by an ex-felon, and two counts of robbery with a weapon. In sum the record indicates, starting in 1964, thirteen felonies accompanied by violence or threat of violence to ten persons, for which he pled guilty or was convicted.

The circumstances surrounding the murder by ligature strangulation support the jury's finding that the murder involved depravity of mind. It can be inferred that McKenna was harassing and brutalizing Nobles, resulting in the death of a 20 year old inmate for no apparent reason.

From our review of the record, we concludes: (1) that the evidence supports the jury's findings of aggravating circumstances; (2) that the sentence was not imposed under the influence of passion, prejudice, or any arbitrary factor; (3) that the death sentence imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases within the state, considering both the crime and the defendant. See Neuschafer v. State, 101 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 78, August 27, 1985); Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979); Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979).

Accordingly, we affirm McKenna's conviction and sentence.

/s/ _____, C.J. Springer

/s/ _____. J. Mowbray

/s/ _____, J. Gunderson

/s/ _____, J. Steffen

/s/ _____. J. Young

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CHARLES McKENNA,	)	No. 18074
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

ORDER

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. The state has moved for a remand to the district court for the appointment of independent counsel to represent appellant in this appeal. Appellant has not opposed the motion.

Appellant was convicted of first degree murder and sentenced to death. On direct appeal, appellant was represented by the Clark County Public Defender's Office. This court affirmed appellant's conviction and sentence. See McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985).

Appellant filed a proper person petition for post-conviction relief in the district court. In his petition, appellant raised numerous issues, including whether he was deprived of effective assistance of counsel on appeal. The district court

conducted a hearing on appellant's petition, at which appellant was represented by the Clark County Public Defender's Office. At the hearing, a former law clerk of the Clark County Public Defender's Office and a deputy public defender who had represented appellant in his direct appeal both testified in an effort to establish that the Clark County Public Defender's Office had rendered ineffective assistance in appellant's direct appeal. The district court denied appellant's petition, and this appeal followed. The Clark County Public Defender's Office has filed a brief on appellant's behalf in this appeal.

The state now suggests that, because the Clark County Public Defender's Office represented appellant in his direct appeal, we should remand this matter for the appointment of independent appellate counsel. It appears, however, that an actual conflict of interests on the part of the Clark County Public Defender's Office may have pervaded the entire action in the court below. Thus, it appears that the order of the district court denying appellant's petition should be vacated, and that this matter should be remanded to the district court for reconsideration of appellant's petition for post-conviction relief.

Accordingly, the state shall have fifteen (15) days from the date of this order within which to show cause why the

order of the district court denying appellant's petition for post-conviction relief should not be vacated and this matter be remanded to the district for consideration of appellant's petition. Thereafter, counsel for appellant shall have fifteen (15) days to respond. In his response, counsel for appellant shall show cause why this court should excuse his apparent improper conduct in representing appellant in this matter in light of this obvious and substantial conflict of interests, thus necessitating further delay in this matter.[1]

It is so ORDERED.

/s/, C. J.

/s/, J.

/s/, J.

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[1]We defer resolution of the state's motion for a remand pending our receipt of the parties' responses to this order. Further, cause appearing, we grant the state's motion to stay the briefing in this appeal pending resolution of the state's motion for a remand.

cc: Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CHARLES McKENNA,	)	No. 18074
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

ORDER OF REMAND

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. The state has moved for a remand to the district court. Appellant has not opposed the motion.

Appellant was convicted of first degree murder and sentenced to death. On direct appeal, appellant was represented by the Clark County Public Defender's Office. This court affirmed appellant's conviction and sentence. See McKenna v. State, 101 Nev. 338, *705 P.2d 614 (1985)*.

Appellant filed a proper person petition for post-conviction relief in the district court. In his petition, appellant raised numerous issues, including whether he was deprived of effective assistance of counsel on appeal. The district court conducted a hearing on appellant's petition, at which appellant

was represented by the Clark County Public Defender's Office. At the hearing, a former law clerk of the Clark County Public Defender's Office and a deputy public defender who had represented appellant in his direct appeal both testified in an effort to establish that the Clark County Public Defender's Office had rendered ineffective assistance in appellant's direct appeal. The district court denied appellant's petition, and this appeal followed. The Clark County Public Defender's Office has filed a brief on appellant's behalf in this appeal.

The state now suggests that, because the Clark County Public Defender's Office represented appellant in his direct appeal, we should vacate the order of the district court denying appellant's petition, and remand this matter to the district court. Although the state recognizes that such action will delay this matter, the state suggests that the apparent conflict of interests that has pervaded this entire action may result in greater delay in the future if the situation is not remedied.

In response to the state's motion, we ordered counsel for appellant to show cause why this court should excuse his apparent improper conduct in representing appellant in this matter in light of this obvious and substantial conflict of interests. In response, counsel for appellant has informed this court that, although the Clark County Public Defender's Office

represented appellant in his direct appeal, appellant's present counsel, who is a deputy public defender, did not become involved in the case until after the appellate briefs had been filed. Counsel suggest that appellant developed confidence in his present counsel and requested that counsel prosecute his petition for post-conviction relief notwithstanding the conflict of interests with the Clark County Public Defender's Office. Appellant signed a waiver of his right to conflict free representation in the post-conviction proceedings.

In light of appellant's waiver of the right to raise the issue of a conflict of interests on the part of his attorney, we conclude that the imposition of sanctions against counsel is unwarranted at this time. Nevertheless, we do not condone counsel's conduct in representing appellant under these circumstances. It is particularly inappropriate for an attorney to attempt to prove that he, or a member of his law firm, rendered ineffective assistance in representing the client at a criminal trial or on appeal. Such a situation necessarily involves a strong conflict of interests that cannot be overcome by a simple waiver on the part of the defendant. In addition, the potential for abuse in such a situation cannot be overstated. See State v. Suarez, 670 P.2d 1192 (Ariz. App. 1983); see also, People v. Edwards, 497 N.E.2d 1218 (Ill. App. 1986);

Com. v. Byers, 502 A.2d 1324 (Pa. Super. 1986).

Cause appearing, we grant the state's motion. Accordingly, we vacate the order of the district court denying appellant's petition for post-conviction relief. Further, we remand this matter to the district court for the appointment of independent counsel to represent appellant, and for reconsideration of appellant's petition.

It is so ORDERED.[1]

/s/ _____, C. J.

/s/ _____, J.

/s/ _____, J.

/s/ _____, J.

/s/ _____, J.

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[1]This order shall constitute our final disposition of this appeal.

cc: Hon. Myron E. Leavitt, District Judge
Hon. Brian McKay, Attorney General
Honorable Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

APPENDIX G

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. C44366
	)	
vs.	)	DEPARTMENT XII
	)	
PATRICK CHARLES McKENNA,	)	DOCKED R
	)	
	)	
Defendant.	)	
	)	

ORDER DENYING POST-CONVICTION RELIEF

Defendant was charged with the murder of JACK JAMES NOBLES, whose death occurred on January 6, 1979. He was subsequently convicted, after a jury trial, of Murder in the First Degree and the death penalty was pronounced against him. The case was appealed to the Supreme Court; it reversed and remanded the case for a new trial on the grounds that "Defendant's Fifth Amendment privilege against self-incrimination was violated by the introduction of testimony concerning admissions made during a court-ordered psychiatric

examination." McKenna v. State, 98 Nev. 38, 39 n.1, 639 P.2d 557 (1982).

A new jury trial was held and on August 30, 1982, Defendant was convicted of Murder in the First Degree. The jury imposed the death penalty. On appeal, the conviction and sentence were affirmed by the Supreme Court. McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985). A Petition for Writ of Certiorari was denied by the United States Supreme Court on January 21, 1986, with two Justices dissenting.

On March 12, 1986, a Supplemental Warrant of Execution was issued ordering that the Judgment and Sentence of Death against the Defendant be carried out on Monday, March 31, 1986, pursuant to law. On March 19, 1986, an order staying the date of the execution until further order of the Court and quashing the Supplemental Warrant of Execution was entered.

On April 8, 1986, Defendant filed herein a Petition for Post-Conviction Relief pursuant to NRS 177.315 to 177.385, requesting an order setting aside his second conviction and

death penalty on the grounds the sentence was obtained and the death penalty imposed in violation of the Constitution of the and United States and the Constitution of the State of Nevada. NRS 177.315(1). The petition was timely filed within one year from the final decision on appeal. NRS 177.315(3).

A hearing, pursuant NRS 177.365, on the petition was held on Monday, the 1st day of December, 1986, and thereafter the Court entered its Order Denying Post-Conviction Relief. An appeal was taken to the Supreme Court and on October 29, 1987, that court vacated the Order Denying Post-Conviction Relief, remanded the case to this Court for the "appointment of independent counsel to represent appellant and for reconsideration of appellant's petition."

The Court appointed CAL POTTER, III, ESQ., as Attorney for Petitioner; a Supplemental and Amended Petition for Post-Conviction Relief was filed. Thereafter on February 4, 1988, a hearing pursuant to NRS 177.365 was held and petitioner was informed pursuant to NRS 177.380(3) that all

claims which challenge the conviction or imposition of the sentence must be joined in his present petition and that any matter not included in the petition would not be considered in a subsequent proceeding.

At said hearing the State was represented by MELVYN T. HARMON, ESQ., Chief Deputy District Attorney and the petitioner was represented by said CAL POTTER, III, ESQ. The Court having heard the testimony of witnesses and listened to arguments of counsel, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

Defendant's admission that he had killed JACK JAMES NOBELS, during examination by a court-appointed psychiatrist was not available for use by the prosecution in the second trial. Because these incriminating statements were not used, the testimony of Detective Burton Levos became a crucial part of the State's case.

Defendant's attorneys in his first trial were not his attorneys in the second trial. HOWARD C. JONES, ESQ., moved from the jurisdiction of the Court and MICHAEL CHERRY, ESQ., refused to represent the defendant because of a dispute with the County Comptroller over the payment of his fees. KENT ROBISON, ESQ., was appointed along with KENNETH McKENNA, ESQ., (Defendant's brother) to represent the Defendant. During the second day of the trial a meeting was held in the judge's chambers with ROBISON and the same County Comptroller who informed ROBISON that the county would not pay his airfare or room and board (ROBISON's office is in Reno) or pay his fees. KENNETH McKENNA stated the agreement between ROBISON and himself was that ROBISON "would help him represent his brother and handle the difficult witnesses." He was also to make the opening statement and final summation. KENNETH McKENNA was to handle the trial, do all the pre-trial research and prepare motions.

After the meeting in chambers ROBISON was allowed to withdraw from the case by the trial judge and he left for Reno. For three days, KENNETH McKENNA was the sole counsel for defendant during which jury selection was conducted. On Monday, the first day of testimony, BRUCE BEASLEY, ESQ., appeared as co-counsel and remained throughout the remainder of the trial.

KENNETH McKENNA's experience was limited to civil law; he had not represented a defendant in a felony case nor had he ever represented a client in a jury trial. The defendant, knowing of his brother's inexperience, still requested his representation because he could "trust" him. (The brother had passed the bar and was licensed to practice in September, 1980, almost two years before the trial herein.)

Defendant did not have any lengthy discussions with his attorneys concerning strategy or tactics. He did have short discussion of about one hour with ROBISON prior to trial regarding the manner in which the trial would be conducted. ROBISON and KENNETH McKENNA had prepared for the

trial by reading all the transcripts, including the complete transcript of the first trial.

Prior to the trial, Defendant's attorneys did not request a hearing to determine the admissibility of the testimony concerning the nonverbal response of the Defendant to Detective Levos' question. Defendant was not informed that his (McKENNA's) testimony at such an admissibility hearing could not be used against him during the guilt phase of the trial.

Six days prior to trial the Defendant filed a motion seeking the production of five witnesses. The trial judge denied the motion for production of FRANK DePALMA on the grounds that he was an alibi witness and notice to call such witnesses must be given to the State ten days prior to trial. NRS 174.087. The offer of proof was that DePALMA would testify that Defendant was locked in a cell where a poker game was taking place and not in the cell where the victim's body was found.

During the guilt phase of the trial, Defendant's attorney did not object to testimony by Detective Levos that after being read his Miranda rights Defendant said, "I don't want to talk about it." No motion to strike or motion for mistrial was made.

Similarly, no action was taken concerning Detective Levos' testimony as to a nonverbal response of the Defendant. During an interview conducted January 18, 1979, two days after the death of the victim, Detective Levos asked the Defendant, "Are you involved in the case of the jail in reference to Nobles' murder?" In reply to the question, Levos stated that the Defendant "looked at him, nodded yes, and smiled." The interview was at the request of the Defendant who wanted to make a deal. The testimony of the nonverbal response was admitted at the trial. No objections were made concerning the prosecutor's remarks to the jury about the nonverbal response.

During the penalty phase of the trial Defendant's attorney made no objection as to an instruction given by the

court concerning depravity of mind as an aggravating circumstance. The jury was instructed:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and integrity. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously horrible or inhuman. (Instruction No. 12.)

The jury was also instructed that a sentence of:

> Life imprisonment without the possibility of parole does not exclude executive clemency. (Instruction No. 5.)

The penalty jury received evidence of Defendant's past record which included convictions for "thirteen felonies accompanied by violence or threat of violence to ten persons, for which he plead guilty or was convicted." [See McKenna v. State, 101 Nev. 338, 350, 705 P.2d 614 (1985), where a

more complete description of Defendant's prior criminal record is reviewed.]

After considering the evidence, the jury found two aggravating circumstances:

1. The murder was committed by a person who was previously convicted of another felony or felonies involving the use or threat of violence to the person of another and

2. The murder involved depravity of mind.

The jury found there were no mitigating circumstances sufficient to outweigh the aggravating circumstances. Based upon those findings the jury imposed the death penalty on September 2, 1982.

A notice of appeal from the judgment of conviction and sentence was filed September 28, 1982, bs trial counsel. The Public Defender was appointed to perfect the appeal on January 5, 1983.

On January 27, 1983, five months after the jury verdict, Defendant's trial counsel filed a motion for a new trial

based upon the affidavit that one of the State's witnesses, *DAVID ROSSI*, had been coerced into giving his testimony. The motion for a new trial was denied on March 23, 1983, a notice of appeal from the denial of that motion and a designation of record was filed on April 14, 1983. No further action was taken concerning that aspect of the case.

A law clerk in the Public Defender's Office, who had graduated from law school but had not passed the bar, was assigned to read the transcripts and prepare the appeal brief. The clerk had no prior criminal or appeal practice.

ROBERT LARSEN, ESQ., Deputy Public Defender, read parts of the transcript but relied upon the law clerk's selection of issues to be raised on appeal. He also had several telephone conversations with the Defendant about his appeal. Although there were other issues known by LARSEN that were not raised in the appeal, he approved the brief and submitted it to the Supreme Court. A different Public Defender was assigned to argue the case on appeal only a few days prior to the time set for oral arguments. He requested

a continuance because he was not familiar with the facts or issues of the case. The request was denied.

From the foregoing Findings of Fact the Court determines that there are the following:

ISSUES PRESENTED

Defendant presents three areas in which he claims his conviction was obtained and his sentence imposed in violation of the United States Constitution and the Constitution of the State of Nevada.

FIFTH AMENDMENT

1. Defendant states his right to due process was violated when the court denied his motion for a new trial based on newly discovered evidence. He claims that DAVID ROSSI lied when he testified that he saw the Defendant strangle the victim. He further offers that the witness was coerced into giving the false testimony.

2. Defendant claims his right to remain silent and to not be compelled to be a witness against himself was violated by the court by allowing the testimony of Detective Levos concerning the nonverbal response and the statement made by Defendant (after being first advised of his Miranda rights) that he didn't want to talk.

3. Defendant further claims that the prosecutor's remarks to the jury concerning the nonverbal response was in violation of his right to remain silent.

EIGHTH AMENDMENT

FOURTEENTH AMENDMENT

1. Defendant asserts that Instruction 5 regarding executive clemency was given in violation of the Eighth Amendment ban against cruel and unusual punishment.

2. Defendant objects to Instruction 12 and the finding by the jury that the murder involved depravity of mind as being in violation of a ban against cruel and unusual punishment.

SIXTH AMENDMENT

1. Defendant says his rights to compulsory process for obtaining witnesses in his favor were denied when the court refused to allow his alibi witness to testify.

2. Defendant argues that his right to effective assistance of counsel was denied at both the trial level and on appeal.

At the trial level Defendant states his counsel was ineffective in the following ways:

A. Failure to appeal the order denying his motion for a new trial.

B. Failure to file a notice of alibi witness.

C. Failure to object, make a motion to strike or for a mistrial based on the

prosecutor's remarks in closing argument concerning Defendant's nonverbal response to Detective Levos' question.

D. Failure to object to instructions that "life imprisonment without the possibility of parole did not exclude executive clemency" and Instruction 12 concerning depravity of mind.

E. Failure generally throughout the trial of counsel to effectively represent defendant because of inexperience in criminal matters.

F. Failure to advise Defendant of his right to a hearing, pursuant to NRS 47.090, regarding the admission of the nonverbal response and that Defendant's testimony at that hearing could not used against him concerning his guilt.

G. Failure to place into evidence a medical examiner's report that victim at the time of his death morphine or heroin in his blood.

On the appeal, Defendant asserts ineffective assistance of counsel as follows:

A. A law clerk not authorized to practice law in Nevada examined the transcript, selected the issues to be raised on appeal and wrote the brief on appeal.

B. An Assistant Deputy Public Defender reviewed only parts of the transcript and relied on the research and the selection of issues by the law clerk.

C. The Chief Deputy Public Defender was assigned to the case only a few days before the oral argument in the Supreme

Court and was not familiar with the facts or issues of the case. He was denied additional time to prepare for argument.

Based upon the foregoing Findings of Facts and Issues Presented, the Court makes the following:

CONCLUSIONS OF LAW

All claims that have been previously heard and decided adversely against a defendant in a prior state hearing cannot be later revived in another action. The ruling in the first instance becomes the law of the case on all subsequent proceedings. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975); Walker v. State, 85 Nev. 337, 343, 455 P.2d 34 (1969): State v. Loveless, 62 Nev. 312, 150 P.2d 1015 (1944).

Any issues raised in a post-conviction relief petition which could have been raised on direct appeal are considered waived unless the court finds good cause shown for the failure to present such claims. NRS 177.375; Johnson v. Warden, 89 Nev. 476, 515 P.2d 63; Nall v. Warden, 86 Nev. 489,

491, 471 P.2d 218, 219 (1970): Craig v. Warden, 87 Nev. 39, 482 P.2d 325 (1971).

FIFTH AMENDMENT

The Defendant either presented or had an opportunity to present all of the issues concerning alleged violations of his Fifth Amendment rights.

Although the denial of the motion for new trial was not specifically and directly appealed, it could have been raised in the general appeal of the case. ROSSI's testimony was discussed by the appellate court in its decision and any claim of its being perjurious or coerced could have been raised on direct appeal. Likewise, ROSSI's recantation of his testimony could have been raised on direct appeal.

Defendant's assertions concerning the nonverbal response were raised on direct appeal. Defendant claimed the nonverbal response was made as part of a plea negotiation and that it was inadmissible. NRS 48.175(l). He also claims that it was ambiguous. The Court rejected the arguments. Defendant now claims testimony of the response was given in

violation of his rights against self-incrimination. He further claims testimony of his desire not to talk was given in violation of said rights. Both of these issues could have been raised on direct appeal. The Supreme Court cited Harrison v. State, 96 Nev. 347, 608 P.2d 1107 (1980), in its decision of this case wherein the Court said:

> If an incriminating statement is heard and understood by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the statement is admissibie at trial.

The court then concluded:

> McKenna responded to Levos' question whether he was involved in the Nobles' murder by nodding yes and smiling. Appellant's nonverbal response was not ambiguous and was properly admitted into evidence. McKenna v. State, 101 Nev. 338, 345, 705 P.2d 614 (1985).

The law of this case is that the nonverbal response was properly admitted; therefore, any prosecutor's comments on the nonverbal response were proper.

EIGHTH & FOURTEENTH AMENDMENT

The claim that Instruction No. 5 regarding executive clemency was given in error was raised on direct appeal and rejected. The Court stated:

> . . . we do not believe, in this case, that a different verdict would have been reached if the procedure set forth in Petrocelli had been followed in the instant case. McKenna v. State, supra at 349.

The issue concerning Instruction No. 12 was likewise raised on direct appeal. The Supreme Court held:

> The circumstances surrounding the murder by ligature strangulation support the jury's finding that the murder involved depravity of mind. It can be inferred that McKenna was harassing and brutalizing Nobles resulting in the death of

a 20-year-old inmate for no apparent reason.

McKenna v. State, supra at 351.

The case of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), cited by Defendant is distinguishable. In Godfrey the defendant killed his wife and his mother-in-law with a single shotgun blast each. They both died instantly and there was no aggravated battery or torture involved. The jury found only one aggravating circumstance "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court held:

> Thus, the validity of the petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity

> of mind . . . We conclude that the answer must be no. The petitioner's crimes cannot be said to have reflected a consciousness materially more depraved than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. Godfrey v. Georgia, supra at 433.

The Godfrey case does not prevent the imposition of a death penalty based on depravity of mind under the proper facts and circumstances.

Further, the Nevada Supreme Court held that under the facts of this case the jury could find depravity of mind as an aggravating circumstance. Plus, the jury also found an additional aggravating circumstance in that the murder was committed by a person previously convicted of a felony or

felonies involving the use or threat of violence to the person of another. Therefore, the claims raised by Defendant that his rights under the Eighth and Fourteenth Amendment were violated are without merit.

SIXTH AMENDMENT

The question concerning the testimony of the alibi witness, FRANK DePALMA, was discussed at length by the Supreme Court in the decision of this case. The Court recites:

> The proffered testimony in this case appeared for the first time approximately three and one-half years after the murder and following the close of the prosecution's case. McKenna failed to demonstrate, either at trial or on appeal, that good cause existed for the belated production of DePALMA. We conclude, therefore, that the exclusion of this testimony was not error. McKenna v. State, supra at 347.

There was no denial of Defendant's Sixth Amendment right to compulsory process.

The Defendant raises the issues of ineffective assistance of counsel at both the trial and appellate level. The right to be represented by an attorney is fundamental and essential to a fair trial and is guaranteed to one accused of felony under the Sixth Amendment to the United States Constitution. In order for the right to be meaningful, the attorney representing the accused must be effective. The standard in measuring the attorney's performance is whether the accused received "reasonably effective assistance" from his counsel. Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

Before a claim by a convicted defendant of defective assistance of counsel can be successful in reversing or setting aside a conviction the defendant must prove, "first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). One who

complains of ineffectiveness of counsel's assistance has the burden to prove that such representation was not "within the range of competence demanded of attorneys in criminal cases" and ". . . fell below an objective standard of reasonableness." Strickland, supra. He must "identify the acts of omission of counsel that are alleged not to have been result of reasonable professional judgement," and a strong presumption exists that the attorney's "conduct falls within the wide range of reasonable professional assistance." Strickland, supra. Even if the presumption is overcome, the convicted defendant must also "show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct the counsel's perspective at the time." Strickland, supra.

The right of a criminal defendant to have effective assistance of counsel is also guaranteed on his first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Defendant has no constitutional right to require his lawyer to argue all nonfrivolous issues that he wants advanced but which his lawyer, in his judgment, decides not to present on appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 694 (1983).

There is no right to free counsel beyond the first appeal. Ross v. Moffitt, 417 U.S. 600, 945 S.Ct. 2437, 14 L.Ed. 341 (1974): Douglas v. California, 372 U.S. 355, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). The instant case is review of Defendant's second appeal, but effective assistance of counsel is necessary to avoid making the appeal a "meaningless ritual." Douglas v. California, supra.

Defendant claims the acts of his attorneys at both the trial and appellate level were below the standard of "reasonably effective assistance."

TRIAL

INEXPERIENCE OF COUNSEL

Defendant claims that because of the inexperience of his counsel errors were made throughout the trial.

> The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2050 (1984).

Defendant specifically wanted his brother to represent him because he could "trust" him. Defendant was aware of his inexperience. He could have been represented by other court-appointed lawyers (such as those who represented him in his first trial), but chose instead to place his fate in the hands of his brother. Additional help was obtained by having ROBISON and later BEASLEY assist him. Except for three days during which the jury was selected he was assisted by another lawyer. As for the days during jury selection it should

be noted that pursuant to NRS 175.031, the District judge may conduct the entire selection himself. Oliver v. State, 85 Nev. 418, 456 P.2d 431 (1969).

This is a unique case in one respect. The attorneys representing the defendant in his trial had a complete transcript of the first trial which they used as a blueprint in conducting the second trial. They knew the testimony of the State's witnesses, they had the benefit of reviewing previous counsel's cross-examination of the State's witnesses, and knew what the prosecutor said in his previous opening statement and final summation. This was in addition to testimony given at the preliminary hearing of the case. All counsel had reviewed these transcripts. This was an advantage not normally granted defense attorneys. "The right to the effective assistance of counsel is recognized not for its own sake but because of the effect it has in the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2046 (1984).

An examination of the record does not show a general ineffectiveness by reason of inexperience.

The United States Supreme Court has ruled that defendant has a constitutional right to defend himself if he knowingly and intelligently waives his right to counsel. The defendant's skill or legal knowledge is not relevant. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Here, petitioner requested the court to appoint his brother knowing of his experience. He cannot now complain such representation was ineffective.

As the State points out, there could be a tactical advantage with a brother representing his brother; such an arrangement is one the jury could relate to and could invoke sympathy towards the defendant.

FACTS OF OMISSION

Defendant asserts certain acts of omission which he claims deprived him of effective assistance of counsel. This claim must be judged not by hindsight or second-guessing but "from counsel's perspective at the time." Strickland, supra.

Specifically he lists:

A. Failure to appeal the order denying motion for new trial.

As stated above, (although not specifically appealed), the merits could have been raised in the general appeal. ROSSI testified at a preliminary hearing and two trials under oath. His testimony was in conformity with that of other witnesses. His subsequent recanting of that testimony was not a valid ground for a new trial.

B. Failure to file notice of alibi other witnesses.

The failure to produce the alibi witness did not prejudice the Defendant of a fair trial in light of the substantial evidence, including eye-witnesses, that Defendant was in the same cell where the victim was found.

C. Failure to object, make a motion to strike or for a mistrial based on the prosection's remarks in closing argument.

The nonverbal response and testimony of Detective Levos concerning the reading of Miranda rights were considered by the Supreme Court and it ruled that the evidence was properly admitted. The prosecutor's comments were not based upon Defendant's silence. They were concerning the nonverbal response. In any event, the comments, if improper, must fall within the harmless error rule since the other evidence in the case was so overwhelming that it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The evidence consisted of the testimony of two eye-witnesses to the murder. There was evidence placing the Defendant in the same cell as the victim. Testimony was presented that prior to the murder Defendant was harassing the victim. All of this occurred one day after the Defendant was convicted of robbery, two counts of second degree kidnapping with a deadly weapon and three counts of sexual assault.

D. Failure to object to instructions.

Both instructions to which Defendant objects were approved on direct appeal by the Supreme Court. Failure to object was not prejudicial to Defendant's right to a fair trial.

E. Failure to inform Defendant of a right to a hearing pursuant to NRS 47.090 concerning the nonverbal response.

Again, since the Supreme Court ruled such response was admissible there was no prejudice to Defendant by reason of not informing him or not requesting such a hearing.

F. Failure to introduce the medical examiner's report that the victim had morphine or heroin in his blood.

Petitioner asserts that with this evidence an argument could have been made to the jury that the victim was not a nice guy or was dealing with dope. The Court concludes that such evidence, even if introduced, would not have produced a different result.

APPEAL

A. A law clerk who was a law school graduate but not authorized to practice law in Nevada selected the issues to be raised on appeal and the Deputy Public Defender relied upon her decision.

Numerous items were raised in direct appeal, all of which were reviewed by the Deputy Public Defender after several telephone conversations with the Defendant.

B. Failure to allow a continuance before arguing the appeal.

There is no showing of prejudice by the failure to grant the continuance.

Furthermore, any ineffective assistance of counsel during the appeal phase of the case should be addressed to the Supreme Court Justices who read the briefs, heard the arguments of counsel, and decided the case. Suffice it to say that on the record prevented here, this Court determines that

petitioner's representation on appeal met the standard of reasonably effective assistance.

DECISION

In order to prevail on ineffective assistance of counsel claims, "the defendant must show that there is reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra. Under the totality of the circumstances and evidence in this case there is no reasonable probability that, absent the alleged errors, the judgment of conviction and the sentence imposed by the jury would have been different.

Therefore, by reason of the foregoing, it is hereby

ORDERED, that Defendant's Petition for Post-Conviction Relief is denied. It is further

ORDERED, that the stay of execution previously entered in this case is vacated. It is further

ORDERED, that a copy of this Order in this case mailed forthwith to CAL POTTER, III, ESQ., Attorney for Petitioner, 428 South Fourth Street, Las Vegas, Nevada

89101, MELVYN T. HARMON, ESQ., Chief Deputy District Attorney, Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada 89155, BRIAN McKAY, Attorney General, Capitol Complex, Carson City, Nevada 89710, and GEORGE SUMNER, Warden Nevada State Prison, P. O. Box 200, Carson City, Nevada 89702.

Dated this 17th day of February, 1988.

/s/
MYRON E. LEAVITT, DISTRICT JUDGE
DEPARTMENT XII

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CHARLES McKENNA,	)	No. 19026
	)	
Appellant,	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

ORDER DISMISSING APPEAL

On August 30, 1982, appellant was convicted upon a jury verdict of the brutal strangulation murder of Jack Nobles in cell 4A2 of the Clark County Jail.[1] The jury sentenced appellant to death. We affirmed appellant's conviction and sentence in McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985), cert. denied, McKenna v. Nevada, 474 U.S. 1093 (1986). On April 18, 1986, appellant filed a petition for post-conviction relief. After a hearing, the district court issued an order denying appellant's petition. Thereafter, appellant filed

[1]This was appellant's second trial on this charge. We reversed appellant's first conviction in McKenna v. State,98 Nev. 38, 639 P.2d 557 (1982).

a notice of appeal from the district court's order. On October 29, 1987, this court vacated the district court's order denying post-conviction relief and issued an order of remand, which inter alia, instructed the district court to reconsider appellant's petition for post-conviction relief. Subsequently, appellant filed a supplemental and amended petition for post-conviction relief. After reconsidering appellant's petition, the district court issued an order denying appellant's supplemental and amended petition for post-conviction relief. This appeal followed.

Appellant first contends that the court below erred in concluding that the trial court properly denied his motion for a new trial.[2] Specifically, appellant contends that a new trial was warranted because McKenna's cellmate, David Rossi, recanted his testimony. At trial, Rossi testified that he saw McKenna choking Nobles. McKenna, 101 Nev. at 341, 705 P.2d at 616. Although appellant filed a notice of appeal from

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[2]On February 10, 1983, appellant filed a motion for a new trial based upon the affidavit of prosecution witness David Rossi, who alleged that his testimony had been coerced. On March 23, 1983, the district court issued an order denying appellant's motion for a new trial.

the trial court's order denying his motion for a new trial, he apparently never pursued his appeal. We need not address issues which could have been raised in a previous appeal. See NRS 177.375; Craig v. Warden, 87 Nev. 39, 482 P.2d 325 (1971).

Furthermore, we hold that the district court properly denied appellant's motion for a new trial. Evidence that a prosecution witness perjured himself at trial is sufficient to justify the granting of a new trial only if the testimony of the witness is so important that a different result must follow. King v. State, 95 Nev. 497, 596 P.2d 501 (1979). Our review of the evidence reveals that Rossi's testimony was not so crucial that a different result must follow if he were impeached. In his brief, appellant conceded that his adoptive admission was the State's strongest argument. The court below did not err in concluding that the trial court properly denied appellant's motion for a new trial.

Appellant contends the district court erred in concluding that he was not denied due process of law when the trial court

instructed the jury that life imprisonment without the possibility of parole did not exclude executive clemency. This contention has no merit. This court addressed this issue when appellant raised it on direct appeal. Although we disapproved of testimony concerning executive clemency, we held that the error, if any, was harmless. McKenna, 101 Nev. at 348-49, 705 P.2d at 621. Thus, our decision is now the law of the case with respect to this issue and the district court properly rejected this post-conviction claim. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Appellant next contends the district court erred in rejecting his claim that the jury instruction concerning the aggravating circumstance of depravity of mind violated the eighth and fourteenth Amendments of the United States Constitution. Specifically, appellant contends that the trial court failed to properly define depravity of mind for the jury. However, appellant waived this issue by failing to raise it on direct appeal. See NRS 177.375; Craig v. Warden, 87 Nev. at 40, 482 P.2d at 325-26.

Moreover, the contention has no merit. The jury instruction in question is virtually identical to that approved by this court in Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986). Finally, we held in appellant's direct appeal that "[t]he circumstances surrounding the murder by ligature strangulation support the jury's finding that the murder involved depravity of mind." McKenna, 101 Nev. at 351, 705 P.2d at 622-23. Therefore, any error concerning the jury instruction was harmless and the court below correctly concluded that this contention did not constitute proper grounds for post-conviction relief. See NRS 178.598.

Appellant contends that prosecutorial misconduct denied him due process of law. Again, appellant waived this contention by failing to raise it on direct appeal. NRS 177.375; Craig v. Warden, 87 Nev. at 40, 482 P.2d at 325-26. Furthermore, even assuming arguendo that the prosecutor engaged in forensic misconduct, when, as here, evidence of guilt is overwhelming, even aggravated prosecutorial remarks

will not justify reversal. Dearman v. State, 93 Nev. 364, 566 P.2d 407 (1977).

Appellant contends that he was denied effective assistance of counsel at trial and on direct appeal. To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).

Although appellant alleges numerous instances of ineffective assistance, he fails to demonstrate prejudice. Therefore, these allegations are meritless.[3] However,

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[3]One of the allegations of ineffective assistance cited by appellant concerns the inexperience of his counsel, Kenneth McKenna. Mere inexperience on the part of counsel does not satisfy the Strickland standard, and appellant has failed to demonstrate that his counsel's performance fell below any objective standard of reasonableness of that but for counsel's errors, the result of his trial would have been different. Nevertheless, to avert the danger of ineffective assistance in the future, we encourage the district courts to ensure that a capital defendant's counsel is experienced.

appellant does allege that he was prejudiced by counsel's failure to prevent the state from introducing appellant's nonverbal response into evidence.[4] This contention is without merit. This court has already held that appellant's nonverbal response was not ambiguous and was properly admitted into evidence. McKenna, 101 Nev. at 345, 705 P.2d at 619. Thus, appellant cannot show that counsel's performance prejudiced his defense. See Strickland, 466 U.S. at 687.

Appellant also contends that he was prejudiced by counsel's failure to file a notice of alibi ten days prior to trial. Specifically, appellant contends that he suffered prejudice because the trial court refused to order Frank De Palma brought to court to testify on behalf of appellant. At trial, appellant's counsel made an offer of proof to the effect that if De Palma were allowed to testify, he would testify that on the night of the Nobles murder, appellant was locked down

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[4]McKenna's nonverbal response consisted of a look, an affirmative nod, and a smile in response to Detective Levos' questions, "Are you involved in the case of the jail in reference to Nobles' murder?" 101 Nev. at 344, 705 P.2d at 618.

six or seven cells from Cell 4A2, where Nobles was killed.

This contention lacks merit. This court previously held that "[s]ubstantial evidence established that after lockdown on January 6, 1979, Nobles was confined in Cell 4A2 with McKenna . . . ." McKenna, 101 Nev. at 341, 705 P.2d at 616. Because of the weight of this contrary evidence, it is highly unlikely that De Palma's testimony would have established an alibi for appellant. Thus, appellant is unable to demonstrate that he was prejudiced by counsel's failure to file a timely notice of alibi. See Strickland, 466 U.S. at 687.

Appellant alleges that the Clark County Comptroller's Office caused counsel to withdraw during the second trial by denying counsel compensation. Courts presume prejudice when the government interferes with counsel's assistance. Id. at 692. However, the record belies appellant's contention. The record demonstrates that counsel withdrew not because the county denied him compensation, but merely because the county declined to compensate him in advance. We do not believe that the county's payment policy constituted

"governmental interference" as contemplated by the Supreme Court in Strickland. See Id. at 692; United States v. Cronic, 466 U.S. 648, 659, n.25 (1984).[5] Therefore, appellant was not denied the effective assistance of counsel.

Appellant's remaining assignments of error are meritless. Accordingly, we affirm the district court's denial of appellant's supplemental and amended petition for post-conviction relief.

/s/ _____, C.J.
Young

/s/ _____, J.
Steffen

/s/ _____, J.
Springer

/s/ _____, J.
Rose

/s/ _____, J.
Recanzone[6]

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[5] Although we hold that Clark County's refusal to pay appellant's counsel in advance was not prejudice per se, we disapprove of the district court's allowing appellant's counsel to withdraw in the midst of trial.

[6]The Honorable Mario G. Recanzone, Judge of the Third Judicial District, was designated by the Governor to sit in the place of the Honorable John Mowbray, Justice. Nev. Const., art. 6, § 4.

cc: Hon. Myron E. Leavitt, District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Lovell, Bilbray & Potter
Loretta Bowman, Clerk

APPENDIX I

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PATRICK CHARLES McKENNA, Petitioner, vs. SALVADOR GODINEZ, et al., Respondents.	)	CV-S-90-785-PMP(LRL) **MEMORANDUM DECISION AND ORDER**

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking the validity of his conviction for murder and sentence of death. His direct appeal is reported as McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985), cert. denied, 474 U.S. 1093 (1986). Although Petitioner has raised five (5) grounds for relief,[1] this order will only address the one claim which is meritorious: that the depravity of mind aggravating circumstance was unconstitutionally vague.

[1]The other four (4) grounds for relief are: the trial court erred when it did not allow his autobiography to be admitted into evidence during the penalty phase; the cumulative effect of alleged prosecutorial misconduct resulted in an unfair trial; the denial of his motion for a new trial; and ineffective assistance of trial and appellate counsel.

I.

Petitioner was convicted of murdering one of his Clark County Jail cellmates by ligature strangulation. The jury found the presence of two aggravating circumstances: (1) the murder was committed by a person who was previously convicted of another felony or felonies involving the use or threat of violence to the person of another; and (2) the murder involved depravity of mind.[2] Petitioner argues that the instructions given the jury on the depravity of mind aggravating circumstances was unconstitutionally vague. This court finds that Petitioner is correct.

A.

The following instruction was given to the jury on the depravity of mind aggravating circumstance:

> You are instructed that an aggravating circumstance of murder in the first degree is where the murder involved depravity of mind.
>
> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and integrity. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously

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[2]The Jury was instructed on, but did not find, a third possible aggravating circumstance: the murder was committed upon one or more persons at random and without apparent motive.

horrible or inhuman.

See page 1540 of the record. This instruction fails to "channel the sentencer's discretion by 'clear and objective standards,'[3] that provide 'specific and detailed guidance,'[4] and that 'make rationally reviewable the process for imposing a sentence of death.'[5]" Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Unlike other cases wherein the jury was instructed on the depravity of mind component of the statutory aggravating circumstance in conjunction with other components, e.g., torture, aggravated battery, serious physical abuse, etc., the above instruction was all that was given regarding the depravity of mind aggravating circumstance.

The aggravating circumstance under consideration in Godfrey was that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Georgia Code § 27-2534.1(b) (7)(1978). Four years earlier in their decision in Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court upheld this aggravating circumstance

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[3]Gregg v. Georgia, 428 U.S. 153, 198 (1976).

[4]Proffitt v. Florida, 428 U.S. 242,253 (1976).

[5]Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

instruction against a vagueness challenge, stating that "there is no reason to assume that the Georgia Supreme Court will adopt...an open-ended construction" so as to allow it to apply to any murder. Id. at 201 (opinion by Stewart, Powell and Stevens, JJ.). Despite this expression of confidence, in Godfrey the Supreme Court encountered a situation wherein the requisite limited construction was not employed.

The Georgia Supreme Court had previously interpreted the phrase "depravity of mind" to mean a "mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." Godfrey v. Georgia, 446 U.S. at 431. However, in Godfrey, there was no evidence of torture or aggravated battery. Consequently, the Supreme Court found the death sentence unable to withstand constitutional scrutiny: "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id., at 433. Hence, a finding of depravity of mind without the additional presence of torture or aggravated battery was constitutionally insufficient to support a death sentence. Two years after the Godfrey decision, Petitioner's jury was instructed with the depravity of mind aggravating circumstance but without any mention of

the need to also find either torture or an aggravated battery.[6]

B.

Petitioner's direct appeal (which did not include the depravity of mind issue) was decided on August 27, 1985. One week later, the Nevada Supreme Court recognized that the holding in Godfrey required some form of torture or aggravated battery to support a finding of depravity of mind. However, it distinguished Godfrey by finding that there was adequate evidence of torture in Rogers v. State, 101 Nev. 457, 705 P.2d 664, 671 (1985), cert. denied, 476 U.S. 1130 (1986).

A year and a half after the denial of his direct appeal, but before Petitioner commenced his initial post-conviction petition proceeding, the Nevada Supreme Court vacated a death sentence based on the depravity of mind aggravating circumstance in Moran v. State, 103 Nev. 138, 734 P.2d 712, 714 (1987), because there was "no indication of torture or sadistic acts..." The court relied on Godfrey as authority for their conclusion that "the record does not support a finding of depravity of mind..." Id.

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[6] Moreover, Petitioner's jury was not instructed on the definitions of torture or aggravated battery.

C.

On January 18, 1990, the Nevada Supreme Court affirmed the denial of Petitioner's post-conviction petition, in which the depravity of mind issue was raised. The court found the issue to be without merit, saying that the "jury instruction was virtually identical to that approved...in Rogers."[7] See p.3, Exhibit #17, docket #22. However, the jury in Rogers was instructed on the meaning of torture and mutilation in addition to depravity of mind, whereas Petitioner's jury was only instructed on depravity of mind. Moreover, the court in Rogers stated that the aggravating circumstance "that the murder involved torture, depravity of mind or mutilation of the victim" was not unconstitutionally vague because a jury is given adequate guidance "when the district court defines for the sentencing panel the terms 'torture,' 'depravity of mind,' and 'mutilate,' as that definitional language is plain and intelligible." Rogers v. State, 705 P.2d at 671 (emphasis added).

Therefore, in two cases decided prior to resolving the depravity of mind issue in Petitioner's case, the Nevada

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[7]The decision in Rogers was issued only one week after the decision in Petitioner's direct appeal.

Supreme Court had recognized that Godfrey required that depravity of mind needed some form of torture or aggravated battery to withstand constitutional scrutiny. See Rogers v. State, supra, and Moran v. State, supra. Additionally, in Deutscher v. Whitley, 884 F.2d 1152, 1162 (9th Cir. 1989),[8] the exact same depravity of mind jury instruction as that given in Petitioner's trial was found to be unconstitutionally vague based on Godfrey just six months before the final decision in Petitioner's case.

Eight months after denying Petitioner's post-conviction appeal, the Nevada Supreme Court again began applying a narrowing interpretation of its depravity of mind instruction. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1608 (1991), the court recognized that Godfrey resulted in a reversal only because the state supreme court had not followed its earlier decisions requiring either torture or aggravated battery when relying on the depravity of mind aggravating circumstance. The court also recognized the finding in Deutscher that the depravity of mind "aggravating circumstance was not conducive to the

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[8] This decision was vacated on other grounds and remanded at 111 S.Ct 1678 (1991). The same finding of unconstitutional vagueness was again found on remand at 946 F.2d 1443 (9th Cir. 1991).

channeling of the jury's discretion as required by Godfrey." Id., 798 P.2d at 570. The state high court then explicitly placed a narrowing construction on Nevada's depravity of mind aggravating circumstance.

> [W]e construe the instruction and the statute (NRS 200.033(8)) upon which it is based as requiring torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind.

Id. The death sentence was upheld because the jury was instructed on torture, for which there was abundant evidence. See also Jimenez v. State, 106 Nev. 769, 801 P.2d 1366, 1369 (1990) ("As we said in Robins, if an aggravating circumstance is based upon depravity of mind, it must include torture, mutilation or some other serious and depraved physical abuse beyond the act of killing itself." Emphasis added).

D.

At the oral arguments before the Nevada Supreme Court in the instant action, Respondents argued that, pursuant to the dictates of Teague v. Lane, 489 U.S. 288 (1989), Petitioner is not entitled to the narrow interpretation announced by the Nevada Supreme Court in Robins. In their supplemental brief, they also argue that the decision in Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988) (holding

that an aggravating circumstance that the murder was "especially heinous, atrocious or cruel" suffers from the same vagueness problem as denounced in Godfrey) is a "new" rule and thus not to be applied to those cases which have become final. Respondents advise that the retroactivity of Maynard is currently pending on certiorari before the Supreme Court from a finding of non-retroactivity by the Fifth Circuit Court of Appeals in Stringer v. Jackson, 909 F.2d 111 (5th Cir.), reh'ing en banc denied, 915 F.2d 695 (5th Cir. 1990), cert. granted sub nom, Stringer v. Black, ___ U.S. ___, 111 S.Ct. 2009 (1991).

However, the aggravating circumstance under consideration in Stringer and Maynard, although similar, are not the same as that found against Petitioner; those decisions are interpreting the vagueness and retroactivity of the aggravating circumstance of "especially heinous, atrocious or cruel" and the need to require some form of torture, etc., whereas the aggravating circumstance found against Petitioner was "depravity of mind". Therefore, whether Maynard established a new rule that should not be applied retroactively is not controlling in Petitioner's case. Instead, this action is controlled by the Godfrey decision on depravity of mind, which pre-dated Petitioner's trial, and the decisions from the

state high court applying the dictates of Godfrey in cases decided before Petitioner's depravity of mind issue was resolved.

Accordingly, Petitioner's sentence represents a "standardless and unchanneled imposition of death" imposed by the "uncontrolled discretion of a basically uninstructed jury...." Godfrey, 446 U.S. at 429. This court can find no rational justification for the state court applying a narrow interpretation of the depravity of mind aggravating circumstance to cases prior to Petitioner (Rogers and Moran) and to cases after Petitioner (Robins and Jimenez) but not to Petitioner. Petitioner's sentence of death based on the aggravating circumstance of depravity of mind as it was applied in his case is an aberration of law and cannot remain.

II.

This action is thus left in the posture of having a death sentence based on one valid aggravating circumstance[9] and one invalid aggravating circumstance.[10] The invalidation of an aggravating circumstance does not automatically require

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[9]The murder was committed by a person who was previously convicted of another felony or felonies involving the use or threat of violence to the person of another.

[10]The murder involved depravity of mind.

vacating the entire death sentence when a valid aggravating circumstance remains. Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990). However, a death sentence may not be automatically affirmed when a valid aggravating circumstance remains, "for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Id. 110 S.Ct. at 1450, citing Barclay v. Florida, 463 U.S. 939, 958 (1983).

A.

It is conceivable that a reweighing is not required when the sentencing authority does not find any mitigating circumstances to exist. In such a scenario, the existence of a remaining valid aggravating circumstance would be a sufficient basis for affirming the death sentence. In Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987),[11] the court found it unnecessary to overturn a death sentence even if one were to assume that one of the three found aggravating circumstances was invalid.

> The jury found, beyond any reasonable doubt, that the murder had been committed by

[11]On remand at 674 F.Supp. 1418 (D. Nev. 1987), rev'd on other grounds, 860 F.2d 1470 (9th Cir. 1988), cert. denied 493 U.S. 906 (1989).

> a person under sentence of imprisonment, and that it had been committed by a person who was previously convicted of another murder, both of which are aggravating circumstances under Nevada law. Nev.Rev.Stat. § 200.033(1), (2). The jury found no mitigating factors. In the absence of mitigating factors, the presence of either of the aggravating circumstances, standing alone, would have permitted the jury to impose the death sentence under Nevada law. Nev.Rev.Stat. § 200.030(4)(a).

Id. 816 F.2d at 1393 (emphasis added). To have the situation wherein a reweighing would not be necessary would require a specific finding that no mitigating circumstances exist, such as that reported in Neuschafer.

The reported decision on the direct appeal of this action contains the required specific finding. The opinion states, "The jury found there were no mitigating circumstances." McKenna v. State, 705 P.2d at 622. However, the record of Petitioner's trial does not support such a conclusion. The jury did find as follows: "We, the Jury, state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances designated." See "Special Verdict", page 1593-94 vol.IV of the record on appeal. This does not mean that no mitigating circumstance were found, but only that they were insufficient to outweigh the two found aggravating circumstances.

Moreover, the jurors were not provided with a form which would allow them to find the existence of certain enumerated mitigating circumstances but which were insufficient to outweigh the designated aggravating circumstances. If that procedure had occurred in this action and the jurors specifically found that no mitigating circumstances existed, then possibly the death sentence based on the remaining valid aggravating circumstance could be affirmed. Although such a procedure may not be required,[12] it would certainly promote a more efficient judicial process. Without this procedure, there is no way to determine whether the sentencing jury found the existence of any mitigating circumstances. Therefore, the only conclusion that can be

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[12]In Rogers v. State, 101 Nev. 457, 705 P.2d 664, 672 (1985), the Nevada Supreme Court denied a claim that "the district court erred by not providing a form or method by which the jury could set forth the specific mitigating circumstances which it found." The court cited to the state statute (NRS § 175.554(3), which only requires a jury to find that the mitigating circumstances do not outweigh the aggravating circumstances) stating, "There is no requirement in the statute mandating that the jury be provided a form to specify the mitigating circumstances which it found."

See also Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 1449 (1991), wherein the Supreme Court said they were not "impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts cannot perform their proper role. ... An appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings." Clearly this does not mean that written findings by the jury would not make the appellate review an easier process, but only that such written findings are not constitutionally required.

drawn is that the jurors relied on the invalid aggravating circumstance to determine that the mitigating circumstances, if they found any, were insufficient to militate against death. Pursuant to the dictates of Clemons, a reweighing of the aggravating and mitigating circumstances must therefore occur.

B.

The reweighing of the one valid aggravating circumstance and any mitigating factors may be constitutionally conducted by a state appellate court. Clemons v. Mississippi, 110 S.Ct. at 1448-50. See also, Cabana v. Bullock, 474 U.S. 376, 385 (1986). At the time of Petitioner's criminal offense, the Nevada Supreme Court had the statutory obligation to weigh the aggravating circumstances. See McKenna v. State, 705 P.2d at 622 n.15. Therefore, whether the Nevada Supreme Court decides to undertake a reweighing in this action or to require a new sentencing hearing is appropriately left to their discretion.

IT IS THEREFORE **ORDERED** that the depravity of mind aggravating circumstance found against Petitioner was unconstitutionally vague. The petition for writ of habeas corpus attacking the validity of Petitioner's death sentence is hereby GRANTED, and the death sentence is therefore VACATED WITHOUT PREJUDICE to further proceedings

by the State of Nevada for redetermination of the sentence.

DATE: February 19, 1992

/s/
PHILIP M. PRO
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PATRICK CHARLES McKENNA,
Petitioner,

V.

SALVADOR GODINEZ, et al.,
Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CV-S-90-785-PMP(LRL)

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to be considered by the Court. The issues have been to [sic] considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED The depravity of mind aggravating circumstance found against Petitioner was unconstitutionally vague. The petition for Writ of Habeas Corpus attacking the validity of Petitioner's death sentence is hereby GRANTED, and the death sentence is therefore VACATED WITHOUT PREJUDICE to further proceedings by the State of Nevada for redetermination of the sentence.

February 20, 1992
Date

CAROL C. FITZGERALD
Clerk

/s/
(By) Deputy Clerk

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK CHARLES MCKENNA, Petitioner-Appellee/ Cross-Appellant, v. ED K. MCDANIEL,* Warden of the State of Nevada, Respondent-Appellant/ Cross-Appellee.	Nos. 93-99001 93-99002 D.C. No. CV-90-785-PMP ORDER

Before: HUG, Circuit Judge.

Respondent-Appellant/Cross-Appellee's Motion to Stay Issuance of the Mandate, filed September 29, 1995, to and including December 5, 1995, is hereby **GRANTED.**

* Ed K. McDaniel, who succeeded Salvadore Godinez as Warden of the Ely, Nevada State Prison, is substituted as respondent in this case. Fed. R. App. P. 43(c)(1).

APPENDIX L

CASE NO. C-44366

DEPT NO. XII

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA)
)
Plaintiff,)
)
-vs-)
)
PATRICK CHARLES MCKENNA,)
)
Defendant.)

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the defendant, PATRICK CHARLES MCKENNA, GUILTY of Murder in the First Degree, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

X The murder was committed by a person who was previously convicted of another felony or felonies involving the

use or threat of violence to the person of another.

_X_ The murder involved depravity of mind.

___ The murder was committed upon one or more persons at random and without apparent motive.

We the Jury, state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances designated.

DATED in Las Vegas, Nevada, this 2nd day of September, 1982.

/s/
FOREMAN

APPENDIX M

CASE NO. C-44366

DEPT. NO. XII

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
PATRICK CHARLES McKENNA,
Defendant.

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the defendant, PATRICK CHARLES McKENNA, GUILTY of Murder in the First Degree, designate that the mitigating circumstance or circumstances which have been checked below outweigh any aggravating circumstance or circumstances.

___ The defendant has no significant history of prior criminal activity.

___ The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

___ The victim was a participant in the defendant's criminal conduct or consented to the act.

___ The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

___ The defendant acted under duress or under the domination of another person.

___ The youth of the defendant at the time of the crime.

___ Any other mitigating circumstance.

DATED in Las Vegas, Nevada, this _____ day of _____, 1982.

_____
FOREMAN

APPENDIX N

28 U.S.C. § 2254(d)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered

as a whole, does not fairly support such a factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

APPENDIX O

Nevada Rule of Appellate Procedure 5

(a). The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

(b). This rule may be invoked by an order of any of the courts referred to in section (a) upon the court's own motion or upon the motion of any party to the cause.

(c). A certification order shall set forth:

(1) The questions of law to be answered;

(2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose;

(3) The names of the appellant and respondent;

(4) The names and addresses of counsel for the appellant and respondent; and

(5) Any other matters that the certifying court deems relevant to a determination of the questions certified.

(d) The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Proceedings in the Supreme Court shall be those provided in the Nevada Rules of Appellate Procedure governing briefs and arguments.

(g) The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and shall be res judicata as to the parties.

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

No. 95-961

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ED K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*Counsel of Record

ISSUES PRESENTED

1. In seeking review of a decision of the Court of Appeals, unanimously affirming a grant of habeas corpus relief, may a state raise issues regarding the prejudicial effect of constitutional error, allegedly justifying this Court's exercise of its discretionary certiorari jurisdiction, when it has never presented those issues to the Court of Appeals, either in briefing on the merits or in a petition for rehearing, and when the position it asserts in this Court is inconsistent with the position it asserted in the Court of Appeals.

2. Is this case an appropriate vehicle for resolving asserted conflicts in the decisions of the Court of Appeals, when the issues asserted were not raised below and the issues themselves are complex, when the apparent conflict is undeveloped because the various decisions involved have not analyzed the dispositive precedents of this Court.

3. Should this Court overrule Parker v. Dugger, 498 U.S. 308, 112 S.Ct. __ (1991), and rule that a jury finding that there are "no mitigation circumstances sufficient to outweigh the aggravating factors" can rationally be interpreted as a factual finding that there are no mitigating circumstances at all, when the jury was given no verdict form allowing it to specify the existence of mitigating circumstances unless the mitigating circumstances outweighed the aggravating circumstances,

when evidence of mitigating circumstances was presented to the jury, and when the state appellate court relied on the jury's verdict in concluding that there were no mitigating circumstances.

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No. 95-961

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ED K. McDANIEL, Warden, Ely State Prison
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Introduction

Respondent accepts the accuracy of the petition for certiorari with respect to the opinions below, the jurisdiction of this court, and the statement of the case. Pet. at 2-3. There are no parties to the case other than those named in the caption.

In this brief in opposition to the petition for writ of certiorari, respondent McKenna will refer collectively to the petitioners (the Warden of the Nevada State Prison at Ely and the Attorney General of Nevada) as the state.

I. The Two Major Issues Presented in the Petition for Writ of Certiorari are not Properly before this Court because they were not raised in the Court of Appeals

The Court of Appeals in this case properly held that the

unnarrowed "depravity of mind" aggravating circumstance was unconstitutionally vague, Pet. App. A-18-19, and the state does not challenge this conclusion. The Court of Appeals recognized that Nevada is a "weighing" jurisdiction. The invalidity of the depravity aggravating factor despite the presence of a single other aggravating circumstance, therefore, required the state in the first instance to address what proceedings - - either reweighing or harmless error analysis - - should be undertaken to ensure that the defendant received the individualized sentencing determination the constitution demands. See Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 1136 (1992).

The state in its petition asserts that certiorari should be granted because the Court of Appeals "refused to conduct a harmless error review pursuant to the harmless error analysis announced in Brecht v. Abrahamson," Pet. at 7 (emphasis added), and that the Court of Appeals "rejected the State's ... contention that the circuit court could and should perform a harmless error analysis." Pet at 15. The state's argument is based on a mischaracterization of the record: the state criticizes Circuit Judges Hug, Hall and Trott for "refusing" to conduct a harmless error analysis for which the state never asked. The issues raised by the state's petition were not raised below, and a "question presented in the petition but not raised in the Court of Appeals is not properly before [this court]." Delta Airlines v. August, 456 U.S. 346, 362

(1981); accord, Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) (court "does not decide questions not raised or involved in the lower court"). The state has made no attempt to demonstrate that this is "one of the exceptional cases," Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970), in which the failure to litigate the issues presented below should not be considered a waiver.

Here, the state never contended in the Court of Appeals that the court was obligated to conduct a harmless error analysis following the invalidation of an aggravating factor in a weighing jurisdiction or that it could not permit the state courts to address that question in the first instance. This Court therefore does not have the benefit of any analysis or resolution of the issue by the court below. Similarly, the state never presented argument in the Court of Appeals as to whether any harmless error analysis of this question should be conducted under Brecht v. Abrahamson, __ U.S. __, 113 S.Ct. 1710 (1993), rather than Chapman v. California, 386 U.S. 18 (1967). Again, this Court is without the benefit of any analysis or resolution of the issue by the court below. Since these questions are complex, see Part II, below, this Court should apply its normal rule and decline to grant certiorari on the basis of the issues not raised below.

Further, assuming arguendo that the Court of Appeals erred in any respect in its decision, the state's failure to raise the issues in the briefing below was compounded by the

state's failure to seek rehearing or rehearing en banc in order to allow the Court of Appeals to address the issues it presents in its petition for certiorari. It is simply not credible to assume that the state was surprised by the Court of Appeals' failure to conduct harmless error analysis under Brecht: the state itself cited Brecht with regard to other errors at issue in the case, but it never suggested that the Court of Appeals should conduct Brecht analysis with respect to the unconstitutional aggravating circumstance. Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief at 2-8, 19, 28, 30. But even assuming that the state was surprised by the decision of the Court of Appeals, and thus that a petition for rehearing was its first opportunity to raise the issue, see, e.g., Brinkerhoff-Faris Trust Co v. Hill, 281 U.S. 676, 677-678 (1930), it did not seek rehearing and thus gave the panel no opportunity to address the issue. Similarly, the state cites a number of cases which suggest confusion as to the procedure for determining the effect of constitutional error and the standard of review to be applied. Petition at 15-21, citing Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994) (en banc); Wiley v. Puckett, 969 F.2d 86, 94 n.8 (5th Cir. 1992); Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994); Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). Not one of these cases was ever cited to the Court of Appeals; and the state gave neither the panel of the Court of Appeals nor the en banc

court the opportunity to analyze any of these decisions, because it did not seek rehearing to correct any perceived error in the Court Appeals' decision or to harmonize its decision with apparently inconsistent authorities. The state has simply sandbagged Respondent, as well as Judges Hug, Hall and Trott, by raising these issues for the first time on certiorari. This Court should recognize that the issues presented are not properly before this Court and deny certiorari.

The state's attack on the Court of Appeals for "refusing" to conduct a harmless error analysis which the state did not request is particularly misdirected because the state had the primary obligation to establish that the constitutional error involved here was harmless. This Court has explicitly held that review of constitutional errors on habeas corpus under any standard "plac[es] the risk of doubt on the State." O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992, 996 (1995); id. (standard of review in habeas corpus proceedings "places the burden on prosecutors to explain why [constitutional] errors were harmless," quoting Brecht v. Abrahamson, 507 U.S. at __, 113 S.Ct. at 1723 (Stevens, J., concurring)); see also id. at 995, citing Chapman v. California, 386 U.S. 18, 24 (1967). The state did not attempt to analyze harmless error based upon review of the entire record; indeed, as shown below, it argued affirmatively that the state should conduct such an analysis in the first instance.

The state's argument that the Court of Appeals was obligated to conduct a harmless error analysis is also inconsistent with the position taken by the state below. In the Court of Appeals, the state repeatedly and consistently argued that, as a matter of comity, the state courts should be given the opportunity to decide how a resentencing should be conducted. The state explicitly argued that "in the interests of comity ... the lower court should have certified certain questions to the Nevada Supreme Court of the present status of Nevada law [on reweighing] or harmless error analysis." Respondents/Appellants/Cross-Appellees' Opening Brief at 23-24. The state cited its own concession in the district court that the court should "send [the case] to the Nevada Supreme Court for decision on that issue." Id. at 24. The state exhorted the Court of Appeals to "afford the Nevada Supreme Court the opportunity to resolve the question [of reweighing or harmless error]", id. at 25. Again the state argued that the Court of Appeals "should, as a matter of comity, certify" the questions of reweighing or harmless error to the Nevada Supreme Court. Respondents/Appellants/Cross-Appellees Joint Answering and Reply Brief at 7. Although the Court of Appeals did not follow the suggested certification procedure, its decision affirming the granting of the conditional writ furthers the respect for comity which the state asserted: the court's decision allows the state court system to determine, in the first instance, what form any resentencing proceeding

should take. Since the state argued consistently in the Court of Appeals that the state courts should be afforded the first opportunity to address the issue of reweighing or harmlessness, it should not be heard to complain in this Court that the Court of Appeals erred in giving the state courts that opportunity: this "is precisely the kind of bait-and-switch strategy that waiver rules, prudential or otherwise, are supposed to protect against." Lebron v. National R.R. Passenger Corp., __ U.S. __, 115 S.Ct. 961, 978 (1995) (O'Connor, J., dissenting); see Steagald v. United States, 451 U.S. 204, 211 (1981) (position taken by government in litigation below prevented reliance on inconsistent position in Supreme Court). Accordingly, the state's failure to advance in the Court of Appeals the issues it raises in the petition for certiorari, and its adoption of a position in the petition for certiorari which is inconsistent with the one adopted in the court below, must result in the conclusion that the issues presented in the petition for certiorari are not properly before this Court.

The sole reference by the state to harmless error analysis in the Court of Appeals was its narrow contention that the death sentence could be upheld solely on the supposition that there were no mitigating circumstances at all: therefore the court could automatically find that any error was harmless beyond a reasonable doubt because there were no mitigating circumstances and "it would be legally

impossible for the remaining [valid] aggravating circumstances to be outweighed." Respondents/Appellants/Cross-Appellees' Opening Brief at 25, 29. The Court of Appeals correctly rejected this argument because it is based on a false premise: there is no finding that mitigating circumstances are not present. Pet. App. A-20; see Part III below.[1] The Court of Appeals thus properly disposed of the only harmless error argument advanced by the state; the state never raised, and the Court of Appeals never decided, the much broader issues relating to harmless error review which are advanced in the petition for certiorari. This Court should reject the state's belated attempt to raise issues far broader than those it raised in the courts below, and it should deny certiorari on the ground that these issues are not properly before it.

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[1] The Court of Appeals' rejection of this contention is sustainable on an additional ground. The state's theory is that the absence of mitigating circumstances can result in automatic validation of a death sentence when there are valid remaining aggravating factors. This theory is based on capital punishment schemes, such as Arizona's, in which a sentencer is required to impose a death sentence if it finds that aggravating circumstances are present and no mitigating circumstances are present. See Jeffers v. Lewis, 974 F.2d 1075, __ (9th Cir. 1992). The Nevada statutory scheme was inaccurately characterized as being of this type in Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987). In fact, under Nevada law the sentencer is never required to impose a death sentence, even when the aggravating circumstances outweigh the mitigating circumstances or when there are no mitigating circumstances at all. The Nevada Supreme Court has explicitly rejected the position that the Nevada scheme is comparable to systems like Arizona's. Bennett v. State, 106 Nev. 135, 144-145, 787 P.2d 797 (1990). Thus even a total absence of mitigating factors could not result in automatic affirmance of a death sentence when aggravating circumstances are present.

II. This Case is not an Appropriate Vehicle for Resolving the Issues Raised in the Petition for Certiorari

The fact that the issues presented in the petition for certiorari were not raised or litigated in the Court of Appeals makes this case an intrinsically inappropriate vehicle for resolving the questions raised by the state. Because of the failure to litigate the issues below, this Court is being required to assess the propriety of review on the drastically limited basis of a certiorari petition and a short opposition, which must attempt to substitute for full litigation and resolution of these issues in the Court of Appeals. It is unfair to this Court, and to the litigants, to attempt to present adequate discussion of these issues in this context.

On the merits, the conflicts asserted by the state as a justification for granting certiorari are not sufficiently substantial to require review. In this case, the Court of Appeals properly found that an invalid aggravating circumstance infected the sentencing decision in a weighing state. The court then followed this Court's own precedents and left to the state court system how the defendant would be resentenced. Pet. App. A-20.

In the leading case on the effect of invalid aggravating circumstances in weighing state, Justice Kennedy's opinion for the Court prescribed precisely what the Court of Appeals did in this case:

> ....use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence

> and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.

Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 1140 (1992) (emphasis added); accord, Richmond v. Lewis, __ U.S. __, 113 S.Ct. 528, 535 (1992) ("where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentencing is to stand.") Nothing in this Court's decision in these cases, or in Brecht v. Abrahamson, suggest that federal courts can perform that "new sentencing calculus" in the first instance. The state cites cases suggesting conflict among the circuits as to whether the federal court should conduct a harmless error analysis itself rather than leaving the "new sentencing calculus" initially to the state. Pet. at 15-18. Remarkably, not one of these cases analyses, discusses, or even acknowledges the controlling language from Stringer or Richmond.[2]

This Court has treated the error arising from invalid aggravating factors as sui generis. In non-weighing states, it has allowed a rule of essentially automatic affirmance when valid aggravating factors are present, Zant v. Stephens, 462 U.S. 862 (1983), unless the error involved in the invalid

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[2] Nor do any of these cases assess the effect, if any, of O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992 (1995), in which this Court held that the state continues to bear the risk of doubt as to the effect of constitutional error.

aggravating factor otherwise affects the sentencing proceeding. Tuggle v. Netherland, __ U.S.__, 116 S.Ct. 283 (1995) (per curiam). In weighing states, by contrast, this Court in Stringer and Richmond has essentially recognized that the weighing of an invalid aggravating factor intrinsically skews the sentencing calculus, and thus requires the state system to reassess the sentence. In the weighing context, federal review of an invalid aggravating factor is less like review of a trial error subject to Brecht analysis and more like a structural error, because the weighing of an invalid factor necessarily compromises the integrity of the sentencing calculus which only the state sentencing system can undertake. These questions have not been developed in this case (because the issues was not raised below) or in the other cases cited by the state, and thus any apparent conflict in the cases is too undeveloped to justify review on certiorari. This case, in which the Court of Appeals followed the prescriptions in this Court's own cases, is a particularly inappropriate vehicle for resolving an insufficiently developed conflict.

This case is also an inappropriate vehicle for assessing questions of federal harmless error review because the Nevada statutory scheme involved is an idiosyncratic one which greatly complicates any assessment of the desirability of harmless error analysis. Nevada is a weighing state, but the result of the weighing calculus does not necessarily dictate the sentence.

> Nevada's statute does not require the jury to impose the death penalty under any circumstance, even when the aggravating circumstances outweigh the mitigating circumstances. Nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death.

Bennett v. State, 106 Nev. at 144-145 (footnote omitted).

In this context, requiring a federal court to conduct harmless error analysis would require an extremely difficult assessment of whether an invalid aggravating factor could have had any effect on a jury which has the absolute discretion to decline to impose the death penalty under any circumstances. An invalid aggravating factor which may have a minimal effect in a weighing process could always influence a juror in the exercise of his or her standardless and untrammeled power to decline to impose the death penalty. Thus the character of any harmlessness analysis is particularly difficult under the Nevada statute; and the considerations which this Court may find relevant to whether harmless error review should be required in the context of this type of statute will be different from the consideration involved in states with standard weighing schemes. Thus this case is not an appropriate vehicle for resolving the broad issue of the desirability of requiring harmless error analysis in the large number of states with different weighing schemes.

The state also argues that the federal courts should conduct harmless error analysis because the state court system may not be able to conduct reweighing analysis under Clemons v. Mississippi, 494 U.S. 738 (1990). Pet. at 22, 15 n.4.

Respondent submits that the possible availability of the particular forms of resentencing under state law is not a relevant consideration in determining whether the federal courts are required to conduct harmless error analysis before allowing the state system the opportunity to address the issue. How the state system chooses to structure its resentencing proceedings is a question of state practice; the federal courts cannot be required to pretermit any state proceedings merely on the basis of a fear that a form of resentencing which the state finds most convenient or favorable may not be available under federal law.

The state and amici curiae argue that the federal court should be required to conduct harmless error analysis in the first instance in order to avoid delay and as a matter of comity. Pet. at 8, 22; Amici Curiae Br. at 7-8. This argument stands the principles of federalism and comity on their heads. The essence of these doctrines is that federal courts will not prematurely resolve federal constitutional questions. To the contrary, state courts have the initial responsibility for vindicating federal rights in state criminal proceedings. E.g., Engle v. Isaac, 456 U.S. 107, 128 (1982). This Court cannot assume that the state courts will disregard this duty and reflexively re-impose death sentences which should not survive reweighing or harmless error analysis: such an assumption would be directly contrary to every principle of comity to which this Court has consistently

adhered.[3] The assumption behind this argument is that state courts will always re-impose death sentences (whether they ought to do so or not) and federal courts will "inevitably" have to conduct a harmless error analysis. This assumption is wholly unjustified, as it would be in any context - - such as the exhaustion doctrine - - in which federal courts are required to allow state courts to rule on constitutional issues and only then to conduct their own review of the state courts' actions. The state's assertion that this delay can only be pointless assumes that the system cannot work properly.[4] This is an assumption that this Court has never countenanced.

Finally, amici curiae argue that the federal courts should be compelled to conduct harmless analysis in order to avoid political embarrassment to state courts. Amici Curiae Br. at 10. The impropriety of this suggestions is staggering: a decision to mandate a certain type of review in order to accommodate the political desires of the state system would in itself violate standards of judicial conduct. American Bar Association, Code of Judicial Conduct, Canon 3(A)(1)

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[3] "The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal ... court 'to upset a state court conviction without an opportunity to the state to correct a constitutional violation,' Darr v. Burford, 339 U.S. 200, 204 (1950)." Murray v. Carrier, 477 U.S. 478, 489 (1986).

[4] To the extent that the state may believe that evidence exists to support its contentions on this point, it has never proffered it because it did not litigate the question below, and thus the record is inadequate to allow rational review of the point.

(prohibiting considerations of "partisan interests, public clamor, or fear of criticism" in decisionmaking). Respondent submits that this Court should disregard this improper argument in its entirety.

This case is also an inappropriate vehicle for deciding whether harmless error review, if it is required, should be conducted under the standard of Chapman v. California, 386 U.S. 18 (1967), or Brecht v. Abrahamson, __ U.S. __, 113 S.Ct. 1710 (1993). As noted above, the state never raised this issue at any stage of the proceedings and in fact the only reference the state made to harmless error review with respect to an invalid aggravating factor invoked the Chapman standard. Respondents/Appellants/Cross-Appellees' Opening Brief at 26. Thus the state cannot maintain that application of the Brecht standard is, or ever has been, in issue in this case. See Steagald v. United States, 451 U.S. 204, 211 (1981). Under these circumstances, the state cannot legitimately contend that the Court of Appeals' decision is in conflict with the decisions of other court of appeals, cf. Sup. Ct. Rule 10.1(a), since the Court of Appeals was never asked to address that issue and it did not do so. It is a significant issue whether a defendant can be prevented from ever having a constitutional error in his or her case reviewed under the Chapman standard, simply because the state courts refused to recognize the existence of the error. The resolution of that question should be reserved for a case in which it is actually

presented.

As shown above, the considerations advanced as grounds for requiring federal courts to conduct harmless error analysis based on invalid aggravating factors present complex issues. Since there has never been any litigation of these issues in any of the courts below, this case is an inappropriate one for resolving them in the first instance.

III. The State's Assertion that there is no Mitigating Evidence in the Record does not form a basis for Certiorari Review because this Court disposed of an Indistinguishable Claim in Parker v. Dugger

The Court of Appeals properly found that a verdict form reciting that the jury states "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances," Pet. App. C-2, does not mean that no mitigating circumstances at all were found to exist. Pet. App. A-20. Normally, it would be a sufficient response to the state's petition to point out that this Court has adopted the same position in a virtually identical case, Parker v. Dugger, 498 U.S. 318 (1991), and there is no basis for revisiting the issue. See Sup. Ct. Rule 10.1(a,c). The state, however, seeks to couch this issue as a failure by the Court of Appeals to respect the presumption of correctness accorded to state factfindings under 28 U.S.C. § 2254 (d). The state's argument is based upon an irrational characterization of the record, which must be clarified.

The Court of Appeals correctly recognized that evidence of mitigating circumstances was presented to the sentencing

jury, Pet. App. A-20, as did the Nevada Supreme Court on direct appeal. Pet. App. D-14-15. In returning its sentencing verdict, the jury endorsed a standard verdict form specifying the aggravating circumstances found and reciting, "We the Jury, state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances . ..." Pet. App. C-2. The jury was not presented with any verdict form both allowing it to find that aggravation outweighed mitigation and specifying mitigating factors. This situation is indistinguishable from Parker v. Dugger. There, the Florida sentencing judge found that there were "no mitigating circumstances that outweigh the aggravating circumstances." 498 U.S. at 314. Given the fact that mitigating evidence was presented, and the trial judge was under no obligation to specify non-statutory mitigating circumstances, id. at 737, this Court found that the trial court's order did not mean that there were no mitigating circumstances at all, but only that the mitigating circumstances did not outweigh the aggravating ones. This Court thus found that the Florida Supreme Court's interpretation of the trial court's order, as meaning that there were no mitigating circumstances at all, was arbitrary and not entitled to a presumption of correctness because it was not supported by the record. Id. at 320; 28 U.S.C. § 2254 (d)(8). The situation presented here is exactly the same.

The state contends, however, that the sentencing jury did

implicitly find that there were no mitigating circumstances because it did not fill out a special verdict form specifying mitigating factors. Pet. App. M-1-2. The state does not discuss the fact that this special verdict form explicitly recited "[W]e, the Jury ... designate that the mitigating circumstance or circumstances which have been checked below outweigh any aggravating circumstance or circumstances." Pet. App. M-1. The state does not explain why a jury which was returning a verdict finding that aggravation outweighs mitigation would also be expected to specify mitigating factors on a verdict form reciting exactly the opposite finding, that mitigation outweighs aggravation. The state's position on this point is irrational to the point of absurdity.

The state also suggests that the Nevada Supreme Court's interpretation of the sentencing verdict implies an independent factual finding that there were no mitigating circumstances. The language of the Court's opinion belies this contention: the Nevada Supreme Court's decision explicitly states that "[T]he jury ... found there were no mitigating circumstances", Pet. App. D-19; see also D-17 n.12 ("the jury found no factors mitigating against imposition of the death penalty.") Thus, just as in Parker, the Nevada Supreme Court's conclusion was not based on any independent evaluation, but simply on its mischaracterization of the jury's verdict. Parker v. Dugger, supra, 498 U.S. at 319-320.

Accordingly, Parker has resolved this question and there is no justification for review on certiorari.

Finally, even assuming arguendo that the state court findings could be considered as establishing an absence of mitigating factors, this would not affect any dispositive issue. As shown above, page 8 n.1, under Nevada law, a defendant need not establish any mitigating circumstance to obtain a sentence less than death, and the jury is never required to impose a death sentence no matter how much aggravation outweighs mitigation, and even in the absence of any mitigation. Bennett v. State, supra, 106 Nev. at 144-145. Accordingly, even a conclusion that there are no mitigating circumstances at all would not invalidate the decision of the Court of Appeals, and review on certiorari is not justified.

IV. Conclusion

For the reasons stated above, this Court should deny the petition for writ of certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ED K. McDANIEL, WARDEN, ELY STATE PRISON, FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
PETITIONERS,

-vs-

PATRICK CHARLES McKENNA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF ARIZONA ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a federal court conduct a harmless error analysis when it finds constitutional error during a capital sentencing proceeding based upon weighing of an invalid aggravating circumstance?

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INTEREST OF THE AMICI CURIAE

The Amici States are states where death-penalty statutes require the sentencing judge or jury to weigh statutory aggravating circumstances and mitigating circumstances in exercising discretion whether to impose the death penalty. They also include states in which a judicial determination whether they are weighing or non-weighing states has not yet been made. The Amici States have an interest in this case because they have an interest in the finality of their judgments. *See McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982). The Amici States assert that when a federal court on habeas review finds constitutional error in the imposition of the death penalty, based on the use of an invalid aggravating circumstance in a weighing state (*see Clemons v. Mississippi*, 494 U.S. 741 (1990)), that court must determine if that error is harmless. If the federal court finds that the error was harmless, the state's interest in finality is preserved, with no prejudice to the prisoner's constitutional rights. The Ninth Circuit's refusal to do a harmless error analysis in this case will

waste judicial resources and cause completely unnecessary delay in the proceedings.

Also, the Amici States have an interest in this Court's enforcing its proscription of unwarranted delay in habeas proceedings, set forth in *In re Blodgett*, 502 U.S. 236, 240 (1992):

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In order to promptly resolve all of the issues presented by the case, the federal court finding constitutional error must decide whether that error was harmless.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant Certiorari To Address an Important Issue It Has Not Addressed—Whether Federal Courts Finding Constitutional Error During a Capital Sentencing Proceeding, Based on the Weighing of an Invalid Aggravating Circumstance, Must Determine Whether That Error Is Harmless.

In a weighing state, where the sentencer balances the aggravating and mitigating circumstances, it is constitutional error for the sentencer to have given weight to an unconstitutionally vague

aggravating circumstance, even if other valid aggravating circumstances remain. *Stringer v. Black*, 503 U.S. 222, 232 (1992). When the weighing process has been "skewed," only constitutional harmless error analysis or reweighing at the trial or appellate level is sufficient to guarantee that a defendant received an individualized sentence. *Id.*

This Court has never addressed whether a federal court finding such error must do a constitutional harmless error analysis. *See Williams v. Clarke*, 40 F.3d 1529, 1538 (8th Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994). However, Amici States submit that this Court's opinions regarding harmless error analysis inevitably lead to the conclusion that a federal court must do a harmless error analysis in such situations.

Since *Chapman v. California*, 386 U.S. 18, 22 (1967), this Court has provided for harmless error review of constitutional error. It has divided constitutional error into two kinds, "trial" error, and "structural" error, with the former being subject to harmless error review and the latter not. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993); *Fulminante v. Arizona*, 499 U.S. 279, 307-08 (1991).

Trial error occurs during the presentation of the case to the jury; structural error is a defect in the constitution of the trial mechanism. *Fulminante*, 499 U.S. at 307–09. In habeas proceedings, the appropriate harmless error standard is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S. Ct. at 1722, *quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946).[1]

This Court has already determined that the error at issue is not structural error, because it has held that state supreme courts in weighing states can determine whether such error is harmless. *Clemons*, 494 U.S. at 752–53; *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality opinion).[2] This rule is in accord with this

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1. If the federal court is in "grave doubt" about the harmlessness, it would find that the error was not harmless. *O'Neal v. McAninch*, 115 S. Ct. 992, 998 (1995).

2. This Court has also held in other contexts that constitutional error at sentencing is subject to harmless error analysis. *Satterwhite v. Texas*, 486 U.S. 249, 256–58 (1988) (error in evidence presented at sentencing); *Zant v. Stephens*, 462 U.S. 862, 888–89 (1983) (error by improperly designating an aggravating circumstance as a statutory aggravating circumstance (in a non-weighing state)). Certainly, whether constitutional trial error is such that it affected the determination of the prisoner's guilt, subjecting him to punishment, is as important as whether constitutional sentencing error affected the determination of that punishment. Also, a federal court can more easily determine the harmlessness of constitutional error at sentencing because that proceeding is, except in an unusual case, much shorter and simpler than the preceding trial.

Court's opinions holding that harmless error analysis applies to erroneous jury instructions at trial. *Pope v. Illinois*, 481 U.S. 497, 503-04 (1987); *Rose v. Clark*, 478 U.S. 570, 583-84 (1986).[3] Accordingly, a federal habeas court finding the error at issue *must* determine whether such error was harmless, applying the *Brecht* standard.

The necessity of harmless error analysis of such error is also indicated by this Court's recent opinion in *Tuggle v. Netherland*, 116 S. Ct. 283 (1995), which found constitutional error at sentencing (in a non-weighing state), but remanded to the Fourth Circuit for further proceedings because neither that court nor the state court had done a harmless error analysis. 116 S. Ct. at 285. This Court found that *Ake*[4] error at Tuggle's sentencing prevented him from contesting the state's psychiatric evidence and from presenting his own mitigating evidence. *Id.* It explained that *Zant v. Stephens* does not hold that a death sentence from a non-weighing state is automatically affirmed

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3. The only exception to this general rule is the erroneous definition of the essential concept of "reasonable doubt." *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993). No such error is presented in this case.

4. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

even if there are one or more valid aggravators remaining after an invalid aggravator has been stricken. *Id.* This Court said it had affirmed the sentence in *Zant v. Stephens* because there were two remaining and "unimpeachable" aggravators, and no claim that inadmissible evidence had been presented to the jurors or that the defendant had been precluded from presenting relevant mitigating evidence. *Id.*

Justice Scalia's concurrence, while disagreeing with the Court's treatment of the case as an "invalid aggravator" case rather than as an "impermissible evidence" case, agreed that remand was appropriate "to allow the Fourth Circuit to review the case under the harmless error standard appropriate to collateral review [the *Brecht* standard]." 116 S. Ct. at 286. The majority opinion made no reference to Justice Scalia's citation to the *Brecht* standard.

After *Tuggle*, this Court would draw a curious distinction if it held that federal courts must analyze whether constitutional error in the consideration of an invalid aggravator was harmless when the case is from a non-weighing state, but need not or cannot when the case is from a weighing state. This Court should take review of this

case to make clear that federal courts must apply a uniform standard of harmless error review (the *Brecht* standard) in habeas proceedings when such error is found, regardless of whether the prisoner is in a weighing state or in a non-weighing state.

The federal circuits are in conflict whether they should do a harmless error analysis in this situation, and if they do, whether they should apply *Brecht* or *Chapman*. *Compare Williams*, 40 F.3d at 1538 (doing harmless error analysis, but applying *Chapman* standard), *Dixon*, 14 F.3d at 975 (doing harmless error analysis and applying *Brecht* standard), and *Marek v. Singletary*, 62 F.3d 1295, 1303 (11th Cir. 1995) (doing harmless error analysis and applying *Brecht* standard) with *Wiley v. Puckett*, 969 F.2d 86, 94 n.8 (5th Cir. 1992) (declining to do harmless error review). Indeed, the Ninth Circuit itself appears unsure whether to do a harmless error analysis in such cases. *Compare McKenna v. McDaniel*, 65 F.3d 1483, 1489-90 (9th Cir. 1995) (not doing harmless error analysis) *with Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995) (citing *Brecht* as proper standard of review for harmless error analysis for error in sentencing instructions in weighing states, but

deciding that California was not a weighing state when the prisoner was sentenced).

Accordingly, Amici States urge this Court to take review and declare that federal courts must do a harmless error analysis in this situation. The Ninth Circuit erred by not determining whether the constitutional error it found in this case was harmless.

B. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE JUDICIAL EFFICIENCY IN BOTH THE FEDERAL AND STATE COURTS.

A second reason for this Court to take review of this case is the practical effect of a federal court's failure to do the harmless error analysis. Amici States submit that requiring the federal court to do the analysis avoids wasting scarce judicial resources, at both the state and federal level. Moreover, such judicial efficiency is achieved with no detriment whatever to the prisoner's constitutional rights.

At first glance, the Amici States' position might seem to run contrary to their interest in federalism. However, because the federal court can promptly and efficiently determine the issue of harmlessness of federal constitutional error, and because there is no issue of state law to be determined by the state court, there is no

state interest in federalism in such situations. *Cf. Stringer*, 503 U.S. at 235 ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law.").

1. The Federal Court Will Likely Have to Make the Determination Later Anyway.

It makes no sense for the federal court not to make a determination now that it will likely have to make later. If the federal court does not do the harmless error analysis, the matter generally goes back to the state supreme court. Under *Clemons*, that court can do a harmless error analysis, or it can reweigh. 494 U.S. at 748–49. Logically, that court will first do a harmless error analysis, because there is no need to engage in a reweighing process if the error was harmless. If the state supreme court finds the error was not harmless, it has spent some time deciding an issue (after several months, maybe longer), that the federal court could have already decided.

If, on the other hand, the state supreme court finds the error was harmless, the matter then heads back to federal district court for

another round of habeas review.[5] After the federal district court has spent some time deciding the issue, it will then go up to the federal court of appeals, which will then be the third court to spend time deciding an issue that should already have been decided.

The issue of whether constitutional error is harmless is a question of federal law. *Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Chapman*, 386 U.S. at 20–21. Because it is an issue of federal law, both the federal district court and the federal court of appeals will examine the harmless error issue *de novo*. *Fulminante*, 499 U.S. at 295; *Marshall v. Lonberger*, 459 U.S. 422, 431–32 (1983). To put it another way, because it is not a factual issue, the federal courts will not show deference to the state court's ruling under 28 U.S.C. § 2254(d); *Thompson v. Keohane*, 116 S. Ct. 457, 463–65 (1995); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963). Also, of course, because review is *de novo*, the federal appellate court will not defer to the ruling by the federal district court. Moreover,

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5. Such review is, for all intents and purposes, automatic in capital cases, because capital prisoners are entitled to counsel under 21 U.S.C. § 848 (q)(4)(B). *See McFarland v. Scott*, 114 S. Ct. 2568 (1994).

because this is an issue of federal law, all three courts will be applying the same federal law of harmless error.[6]

So nothing is gained by sending the issue back to state court—at the cost of having three separate courts, one state and two federal, independently decide the very same issue of law that should have already been decided by the federal court finding the constitutional error in the first place. The other significant cost is that the issue will not be finally decided until several years after it should have been decided. This is a gross and inexcusable waste of both state and federal judicial resources, not to mention taxpayers' money.

Furthermore, there is a question of political accountability. The federal court should make the decision on the issue of federal constitutional law. Remand to the state supreme court makes it look like that court is responsible for the delay in the proceedings. If the state court finds the error was not harmless, it takes the "political heat" for a decision that the federal court should have made. In

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6. The state court will apply federal law because of the Supremacy Clause of Article VI of the United States Constitution. One question might be whether the state court would apply *Chapman* or *Brecht* as its standard for harmless error review. This again shows the dilemma the state courts are faced with by the federal court's failure to do its job.

addition, after the state court decides the harmlessness issue, when the matter finally gets back to a federal court, that court may well look askance at the protracted proceedings, despite the fact that a federal court's (maybe the same court's) failure to do the harmless error review unnecessarily contributed to the protraction. From a broader perspective, this delay adds to the public's frustration with the length of capital proceedings and defeats the states' and victims' interests in the finality of criminal judgments.

Also, for a federal court to send the matter back to the state supreme court for a reasoned determination of the harmless error issue, when the state court's ruling on the issue will receive no deference whatsoever in federal court, treats the state supreme court as the lackey of the federal court system. The federal court is requiring the state supreme court to devote its time and resources to render a useless decision. It is the judicial analogy to the old Army training of having a recruit dig a hole and then fill it back up. As this Court said in *Engle v. Isaac*:

> [T]here is "nothing more subversive of a judge's sense of responsibility, on the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well,

than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."

456 U.S. at 128–29 n. 33, *quoting* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963).

2. If the Federal Court Does Not Make the Harmless Error Analysis, the State Court Is Unsure How To Proceed.

A second practical problem emerges if the federal court does not do a harmless error analysis. The state supreme court does not know on remand what to do with the case. Under *Clemons*, it has the options of doing a harmless error analysis, reweighing, or sending the matter back to the state trial court. However, that court may realize, for the reasons discussed above, that the decision it makes on the harmless error issue will be of no real consequence. To avoid wasting its time, the state supreme court may forego the harmless error analysis it is entitled to do under *Clemons*, and either do an unnecessary reweighing or an unnecessary remand to the trial court for an entirely new sentencing hearing. All of this needless uncertainty and delay is generated by a federal court's failure to do

its job—determining the federal legal issue of the harmfulness or harmlessness of constitutional error.

The Ninth Circuit's opinion in this very case indicates the uncertainty that a state supreme court may face. The Ninth Circuit labels its discussion of this issue as "Requirement to Reweigh." 65 F.3d at 1489. Later, however, citing *Clemons*, the court recognizes that the state court can either reweigh or conduct a harmless error analysis. *Id.* Nevertheless, the court later states, "Thus, under *Clemons*, McKenna must be resentenced in a proceeding where the remaining valid aggravating factor found by the jury is *weighed* against the mitigating evidence." *Id.* at 1490 (emphasis added). Thus, having failed to do a harmless error review itself, the Ninth Circuit appears to have *foreclosed* the state supreme court from doing a harmless error review. If the Ninth Circuit had done its job, by doing the harmless error analysis, there would be no such uncertainty (and indeed no remand at all if it found the error was harmless).

C. THIS COURT SHOULD TAKE REVIEW TO ENSURE COMPLIANCE WITH *BLODGETT*.

This Court has stated that, "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Issac*, 456 U.S. at 128. It should take review of this case to enforce its proscription of senseless delay in habeas proceedings, set forth in *Blodgett*, 502 U.S. at 240. Requiring the federal courts in cases such as this one to do a harmless error analysis would put flesh on the *Blodgett* bones.

In *Blodgett*, this Court considered the Ninth Circuit's 2½-year stay of the execution of a Washington prisoner, occurring after it had heard oral argument on appeal from the denial of his second petition for writ of habeas corpus. This Court expressed concern that the State of Washington had sustained "severe prejudice" because it had been prevented from "exercising its sovereign power to enforce the criminal law." 502 U.S. at 239. It found that, given the potential for prejudice, "the Ninth Circuit was under a duty to consider Campbell's claim for relief without delay." *Id.* This Court held:

> The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

502 U.S. at 240.

First, *Blodgett* requires federal courts to "take all steps necessary to ensure a prompt resolution of the matter." *Id.* If a federal court can resolve a matter now that it will likely have to resolve later, it must resolve it now to ensure a "prompt resolution of the matter." There are some cases that cry out for imposition of the death penalty,[7] and some that are close calls. In this case, the Ninth

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7. For instance, can there be any doubt that the prisoner in the Eighth Circuit case of *Williams* would have been given the death penalty absent the use of an invalid aggravator? Williams, on the first day, raped and murdered two women; on the second day, he raped and murdered another woman; and on the third day, he kidnapped a man and kidnapped and raped a woman. 40 F.3d at 1531-32. Williams was convicted and given two death sentences in the trial for the murders of the first two women. Although finding that one of the instructions regarding an aggravating circumstance given at sentencing was unconstitutionally vague, the Eighth Circuit concluded that it had the authority to do a harmless error analysis, but that *Chapman* rather than *Brecht* was the applicable standard of review. It found that, "the overwhelming force of the evidence . . . convinces us beyond a reasonable doubt that the sentencing panel's improper inclusion of the unconstitutionally vague phrase . . . did not alter the balance." 40 F.3d at 1542. The Eighth Circuit's opinion shows that federal courts are perfectly capable of determining whether such error was harmless, and that the Ninth Circuit shirked its duty by not determining whether the error in this case was harmless.

Circuit should have done the harmless error review after finding constitutional error in order to ensure a prompt resolution of this matter.

Moreover, as a matter of efficiency, what better time and what better court to do the harmless error analysis than the federal court just after it has reviewed the record and has a fresh memory of this case? By contrast, the state supreme court doing a harmless error review on remand will have to read the entire record again in a case that it considered several years earlier.

Second, *Blodgett* requires a federal court to give full and fair consideration to *all* of the issues presented by the case. Obviously, if the court has found the state's reliance on an aggravating circumstance to be constitutional error, the case then squarely presents the legal issue of whether the error is harmless. *See Brecht*, 113 S. Ct. at 1722 (habeas petitioners not entitled to habeas relief based on trial error unless they can establish the error resulted in "actual prejudice"). Because the Ninth Circuit did not decide the harmless error issue, it did not fully and fairly consider all of the issues presented to it by this case. If the error is harmless, the

federal court must make that decision, rather than causing senseless delay by "punting" the matter back to the state courts. A federal court finding constitutional error at a capital sentencing must decide if that error was harmless.

CONCLUSION

For above reasons, Amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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No. 95-961

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ED K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The Issues Presented for Certiorari Review were Preserved in the Lower Court and are Properly Presented in the Instant Petition.

Most of McKenna's argument opposing review of the State's petition is devoted to grossly misleading claims that the harmless error issues were not preserved below. McKenna has chosen to indulge in a course of selectively ignoring the record in crucial respects and at best, misciting the record when it suits him. Understandably, faced with what he begrudgingly concedes to be "apparently inconsistent authorities" among the circuits on the substantive issues presented (Opposition Brief, p. 5)(hereinafter "OB"), McKenna apparently has chosen to mislead the Court in the hope that this Court will not review the merits of the issues presented because of alleged procedural shortcomings. The Court should reject his erroneous arguments.

Essentially, McKenna's Opposition Brief accuses the State of "sandbagging" the lower court and McKenna in several respects. (OB, p.5). He asserts that the State never argued that the federal court should engage in a harmless error analysis (OB, p.2); that the State only contended that the holding of *Chapman v. California*, 386 U.S. 18 (1967) rather than *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993) applies (OB, pp. 3 and 15); that the State never cited certain cases,

including *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994) which demonstrate conflict on the harmless error issue (OB, p. 4-5); that the State only cited *Brecht* with respect to other issues, not with respect to reviewing a death sentence after an aggravator is eliminated (OB, p. 4); and that the State urged the circuit court only to let the state courts act first through a process of certification as to whether the Nevada Supreme Court would affirm the sentence through either a reweighing process or a harmless error review (OB, p. 6). A close review of the state's briefs and pleadings demonstrate otherwise.

In its first brief, filed on August 9, 1993 in the circuit court, the State made the following argument:

> Rather than sustaining the decision of the lower court and thus requiring a new sentencing hearing or alternatively rather than certifying the case to the Nevada Supreme Court, as suggested in the previous argument section of this brief, the State submits that this court may independently review the record and conclude that any error was occasioned by considering the depravity of mind aggravating circumstance, it was harmless beyond a reasonable doubt.

(Respondents/Appellants/Cross-Appellees' Opening Brief, pp. 25-26). Thus, the State put the circuit court on notice that its alternative argument was that independent review of the record by the circuit court for harmless error was appropriate.

In its next brief, filed on December 7, 1993, without limitation on the scope of *Brecht* as the governing standard of harmless error review in collateral proceedings, the State cited to *Brecht* in the context of rebutting McKenna's arguments that his right to post-arrest silence had been impinged substantively and because of his trial counsels' collective ineffectiveness. (Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief, pp. 19, 28, 30). Thus, although not context specific, the circuit court was put on notice of the general standard announced in *Brecht* pertaining to collateral review.

Then, on April 8, 1994, while the case was still pending, the State submitted the first of several similar documents (*see* Appendices P through U), each of which was entitled "Notice of Supplemental Authority Filed Pursuant to FRAP 28(j)." In pertinent part, the notice stated,

> On January 21, 1994, the United States Court of Appeals for the Fourth Circuit issued a en banc opinion in *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994). The opinion addresses an issued [SIC] raised by the state respondents on pages 2 through 8 of the brief referenced above, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error. The circuit court held that a federal appellate court can and should make a harmless error determination under the standard set forth in *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct.1710 (1993), even absent a harmless error

> determination by the state courts. *Smith*, 14 F.3d at 976.

See also, Appendix T (Post argument Notice of Supplemental Authority citing the holding in *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994), which rejected assertion that initial harmless error review could not be performed by federal courts but applying *Chapman* rather than *Brecht* standard).

Thus, before the oral arguments in the circuit court, and contrary to McKenna's incorrect analysis, the State expressly notified the circuit court of at least two relevant, albeit unharmonious holdings on the very issue now before this Court. Then, several months after oral argument in the circuit court, the State submitted another Notice (Appendix U) alerting the panel to this Court's recent holding in *O'Neal v. McAninch*, 115 S.Ct. 992 (1995) and asserting that

> [T]he respondents contend that the alleged trial errors discussed in the sections noted above do not constitute reversible error under *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct. 1710 (1993), as refined in *McAninch, supra*, at___.

While cited specifically in the context of the State's *Doyle* error arguments, the State never conceded or limited *Brecht's* applicability to other issues. Surely, the circuit court should have been no less compelled to review whatever constitutional errors it found under some standard of harmless

error review since the limitation on federal habeas relief to serious errors was established well before McKenna's case arrived in the circuit court. *Yates v. Evatt*, 111 S.Ct. 1884, 1994-95 (1991) (applying harmless error test of *Chapman* "in the first instance" to burden shifting jury instruction).

Here, there was no effort on the part of the circuit court to assess the impact of the error it found under any standard of harmless error review. The responsibility for that deficiency should not be visited upon the State since the circuit court was specifically informed of the State's view that whatever error had occurred was harmless. A fair reading of the numerous notices submitted by the State should lead this Court to the conclusion that the State made every effort to keep the circuit court apprised of both state court and federal court decisions bearing on McKenna's case.

The State does not dispute the fact it has consistently asserted in the district court and the circuit court that the preferred course of action would be for the federal courts to certify certain questions regarding the outcome of reweighing and/or harmless error in McKenna's case to the Nevada Supreme Court. Both the district court and the circuit court rejected the State's suggestion even though McKenna conceded that certification would be a proper course of conduct. The

circuit court then chose its method of disposition, i.e., ordering a new sentencing proceeding, thereby precluding the Nevada Supreme Court from conducting a review under *Clemons v. Mississippi*, 494 U.S. 738 (1990).

The circuit court did so without resort to a common vehicle for analysis of habeas cases, that is, asking the simple question: If we find that federal constitutional error occurred, can we also say that the error was not harmless? Notwithstanding McKenna's fanciful suggestion to the contrary, the State made reasonable efforts to get the issue decided and was rebuffed in its attempts. Having totally foreclosed the State from doing anything other than conducting a new sentencing hearing it should come as no surprise to either the circuit court or McKenna that the State is not content to passively accept a decision that never even addressed whether the error is harmless or something more.[1]

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[1]McKenna cryptically refers to the availability of any "particular forms of resentencing" (OB, p. 13) as an irrelevant consideration in deciding the issues before the Court. This is more than passing strange given the fact that the federal court's ruling has overturned a death sentence found to be permissible in the state court system. One would be hard pressed to cite a more concrete example of federal intervention causing friction between the state and federal courts. His argument bespeaks what McKenna fails to state candidly—if he can convince this Court to deny certiorari, the Nevada courts will be foreclosed from doing anything other than conducting a new sentencing hearing before a new trial jury. There will be no opportunity for the state courts to act once the federal court order requiring

II. The Type of Error Found to Exist by the Circuit Court is Reviewable Under the Brecht Standard.

To the limited extent that McKenna has chosen to address the substance of the State's argument that conflicts exist among the circuits, he makes several arguments remarkable only for their lack of controlling authority from any federal court, and all of which fly in the face of the holdings of the Nevada Supreme Court as well.

One argument is that by urging the federal courts to conduct harmless error analysis in the first instance, the State "stands the principles of federalism and comity on their heads." (OB, p. 13). To be sure, the Nevada Supreme Court (and presumably other state high courts as well) would prefer the first opportunity to correct possibly reversible error—when it is identified. The State urged that exact remedy upon the circuit court. Yet, the Ninth Circuit foreclosed that possibility here by finding error to exist and then automatically ordering a new sentencing hearing. The interests of comity are best served by requiring the federal courts to assess the harmfulness of the error before those courts overturn death sentences. As pointed out in the Petition for Writ of Certiorari, the decision of the panel in this case cannot be squared with its own circuit

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"resentencing" becomes final.

precedents much less those recent observations of other circuits, e.g.:

> [O]rdinarily...the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless error.

Tyson v. Trigg, 50 F.3d 436, 446 (7th Cir. 1995).

McKenna makes an unsupported argument that federal review of the error found here is "[I]n the weighing context, ...less like review of trial error subject to *Brecht* analysis and more like a structural error..." (OB, p. 11). The suggestion, devoid of so much as one citation to bolster it, is preposterous on its face.[2] Moreover, decisions rendered within the circuit and outside it just since the filing of the State's Petition only confirm what the State has pointed out—there is no principled way to defend the panel's decision in this case. There are few forms of structural error, even in capital cases. *Rice v. Wood*, 1996 WL 69838 (9th Cir., Wash., Feb. 20, 1996)(*en banc*

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[2]McKenna fails to recognize that even those federal jurists who have identified error in a capital sentencing context have not gone so far as to make McKenna's argument, that in a weighing state *Brecht* does not apply because it is not expressly mentioned in a *Clemons* type case, nor can it because of unbridled jury discretion even if mitigating circumstances do not outweigh aggravating circumstances. *Flamer v. State of Delaware*, 68 F.3d 710, 770 (Lewis, J., dissenting from denial of habeas relief where statute considered a "hybrid", but recognizing circuit conflict and concluding that *Brecht* standard applies).

holding that defendant's absence from jury's rendition of capital sentence is harmless error under *Brecht*, and *citing Rose v. Clark*, 478 U.S. 570 (1986), for the proposition that structural errors "are the exception and not the rule"); *Castro v. State of Okl.*, 71 F.3d 1502, 1516-17 (10th Cir. 1995) (court expressly disavows *Chapman* standard but nevertheless holds that lack of psychiatric assistance at trial, so called *Ake* error, is reversible trial error under *Brecht).*

Finally, McKenna argues that this Court should decline review in this case because it would be "extremely difficult" for this Court to decide the general issues in the context of what he characterizes as Nevada's "unbridled discretion" sentencing statute (OB, p. 12). Aside from the obvious response—this Court routinely decides exceedingly hard cases—the State notes that McKenna fails to recognize the import of controlling Nevada law on the issues before this Court.[3] His numerous citations to *Bennett v. State*, 787 P.2d 797, *cert. denied* 498 U.S. 925-26 (1990) do not change the

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[3]On January 8, 1996, this Court granted certiorari, vacated the Nevada Supreme Court's judgment in *Libby v. State*, and remanded for further consideration in light of *J.E.B. v. T.B.* (citation omitted), a jury selection case involving gender based peremptory challenges. *Libby v. Nevada*, 116 S.Ct. 691 (1996).There is no indication from this Court's disposition that the portion of the state court's holding in *Libby* pertaining to reweighing or conducting harmless error analysis is problematic.

Nevada Supreme Court's basic analytical framework for cases where invalid aggravators exist—some cases warrant completely new sentencing hearings and some do not. In the latter category, harmless error review can and should occur. (*See* Petition for Writ of Certiorari, pp. 13-15, for analysis of state court opinions).

CONCLUSION

This case begs the questions McKenna does not want answered—whether and what form of harmless error review should apply. McKenna cannot refute the existence of a serious conflict of opinions among the circuit courts as to the applicable standard of harmless error review in the context of an initial federal court finding of an invalid aggravating circumstance in a weighing state. The Court should grant the State's Petition.

Respectfully submitted.

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APPENDICES

APPENDIX P

April 8, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-00001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On March 31, 1994, the Nevada Supreme Court entered an Order Denying Rehearing in Canape v. State, 109 Nev.

864, 859 P.2d 1083 (1994), which is cited and discussed in Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief (filed December 7, 1993) at pages 4 through 7. For the convenience of the court and opposing counsel, I am submitting herewith a copy of the Order and the dissent therefrom by Justice Charles Springer.

On January 21, 1994, the United States Court of Appeals for the Fourth Circuit issued a en banc opinion in Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994). The opinion addresses an issued raised by the state respondents on pages 2 through 8 of the brief referenced above, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error. The circuit court held that a federal appellate court can and should make a harmless error determination under the standard set forth in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993), even absent a harmless error determination by the state courts. Smith, 14 F.3d at 976.

Please file this letter and return a file stamped copy in

enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
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(702) 687-3538

DFS:kls

cc: John Graves, Esq. (w/encs.)
Cal J. Potter, III, Esq. (w/encs.)
Inmate Patrick McKenna (w/encs.)

APPENDIX Q

June 7, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

RE: E.K. McDaniel v. Patrick Charles McKenna, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On May 31, 1994, the Nevada Supreme Court rendered an Opinion in Pertgen v. State, ___Nev.___, ___P.2d___

(1994). For the convenience of the court and opposing counsel, I am submitting herewith a copy of the Opinion. The Opinion addresses an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:td
cc: John Graves, Esq. (with enclosure)
Cal J. Potter, III, Esq. (with enclosure)
Inmate Patrick McKenna (with enclosure)

APPENDIX R

October 4, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On September 29, 1994, the Nevada Supreme Court rendered Opinions in Lane v. State, ___Nev.___, ___P.2d___ (1994); and Smith v. State, ___Nev.___, ___P.2d___ (1994). For the convenience of the court and opposing counsel, I am submitting herewith a copy of each Opinion. The Opinions address an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Additionally, an en banc panel of this court rendered an Opinion in Jeffers v. Lewis, ___F.2d___, Slip. Op., September 28, 1994, which also addresses the issue referenced in the paragraph immediately above. In fact, the three judge panel in this case entered an order taking this case out from under submission pending the decision in the Jeffers case.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls

cc: John Graves, Esq. (w/encs.)
Cal J. Potter, III, Esq. (w/encs.)
Inmate Patrick McKenna (w/encs.)

APPENDIX S

February 3, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On December 2, 1994, the United States Court of Appeals for the Eighth Circuit rendered its Opinion in Williams v.

Clarke, 40 F. 3d 1529 (8th Cir. 1994). The case was published in the January 23, 1995 softbound edition of the reporter cited above. The Opinion addresses an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Please file this letter and return a file stamped copy in the enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls
Encs.
cc: John Graves, Esq. (w/encs.)

FRANKIE SUE DEL PAPA
Attorney General
DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3538

Attorney for Respondents.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK CHARLES McKENNA,	Nos. 93-99001 93-99002
Petitioner-Appellee/ Cross-Appellant,	DC No. CV-90-785-PMP(LRL) **DEATH PENALTY CASE**
vs.	
ED K. MCDANIEL, et al.,	**AFFIDAVIT OF SERVICE**
Respondent-Appellant Cross-Appellee.	

STATE OF NEVADA)
: SS
CARSON CITY)

I, KATHY SCHULTZ, being first duly sworn under penalty of perjury do hereby state:

1. That I am an employee of the Office of the Attorney General, State of Nevada and that on this 6th day of

February, 1995, I served a copy of the foregoing Notice of Supplemental Authority dated February 3, 1995, by mailing a true copy as follows:

. . .

. . .

CAL POTTER
Potter & Associates
1125 Shadow Lane
Las Vegas, Nevada 89102

JOHN GRAVES
Graves & Leavitt
601 S. 6th Street
Las Vegas, Nevada 89101

/s/
Kathy Schultz

SUBSCRIBED AND SWORN to before me

this 6th day of February, 1995.

/s/
NOTARY PUBLIC
Cherril J. Adams

APPENDIX T

March 9, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-00001 [sic] and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On February 21, 1995, the United States Supreme Court

rendered its Opinion in *O'Neal v. McAninch*, ___U.S.___, ___S.Ct.___, 1995 WL 66598 (1995). The Opinion addresses an argument made by the state respondents on page 19, lines 14-26; page 28, lines 2-4; and page 29, line 25-28 and continuing through page 30, lines 1-9, of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief. Specifically, the respondents contend that the alleged trial errors discussed in the sections noted above do not constitute reversible error under *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct. 1710 (1993), as refined in *McAninch*, *supra*, at ___.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls

cc: John Graves, Esq. (with enclosure)
Cal J. Potter, III, Esq. (with enclosure)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 9th day of March, 1995, I served a copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY with attached Authority by mailing a true copy to the following:

John Graves, Esq.
GRAVES & LEAVITT
601 S 6TH STREET
LAS VEGAS NV 89101

and to:

Cal J. Potter III, Esq.
POTTER & ASSOCIATES
1125 SHADOW LANE
LAS VEGAS NV 89102

/s/

APPENDIX U

July 13, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: E. K. McDaniel v. Patrick Charles McKenna
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On June 28, 1995, the United States Court of Appeals for the Ninth Circuit rendered its Opinion in Bonin v. Calderon, ___ F.2d ___, 95 Daily Journal D.A.R. 8895 (9th Cir. 1995). The Opinion addresses an argument made by the state respondents on page 11, line 3 continuing through page 25, line 20, of the Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief. Specifically, the respondents contend that the alleged errors by McKenna's trial and direct appeal counsel discussed in the sections noted above do not constitute error under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) or reversible error under Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993).

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:td

cc: John Graves, Esq. (with enclosure)
Cal J. Potter, III, Esq. (with enclosure)